

BOUND..... AUG 3 '60

Digitized by the Internet Archive
in 2010 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

4/68
33998

EMMA STUT,

Plaintiff-Appellee,

v.

JAMES H. HOOPER,

Defendant-Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

260 I.A. 613

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment of the County Court finding the right of certain household property in the claimant Emma Stut. The only testimony is that of the claimant and her husband. The property was taken on an execution by the sheriff on a judgment obtained by James H. Hooper against John Stut, husband of the claimant.

It is urged as a ground for reversal that the evidence is not sufficient to sustain the claim, and that the court erred in not admitting certain evidence for the purpose of showing that the property had been assessed for a number of years in the name of J. Stut, defendant to the judgment. It is also urged that the court ordered and directed the sheriff to release the property, although there were 6 lamps and some carpets which were not included in the statement of claim.

We have examined the testimony and are of the opinion that there was sufficient evidence to sustain the judgment of the court. We are further of the opinion that the court did not err in refusing to permit the tax books showing the property in the name of J. Stut. It may well have been assessed in his name and still belong to his wife. Moreover, she would not be bound by the act of the assessor. Magerstadt v. Schaefer, 213 Ill. 351.

2001A.613

COOK COUNTY
COURT HOUSE
CHICAGO, ILL.

Plaintiff-Appellee,
JAMES H. HOOVER,
v.
Defendant-Appellant,
JOHN H. HOOVER.

Opinion filed Jan. 28, 1931

MR. JUSTICE J. H. HOOVER delivered the opinion
of the court.

This is an appeal from a judgment of the County
Court finding the right of certain household property in the
claimant James H. Hoover. The only testimony is that of the claimant
and her husband. The property was taken on an execution by
the sheriff on a judgment obtained by James H. Hoover against
John H. Hoover, husband of the claimant.

If it is urged as a ground for reversal that the evidence
is not sufficient to sustain the claim, and that the court erred
in not admitting certain evidence for the purpose of showing
that the property had been assessed for a number of years in
the name of J. H. Hoover, defendant to the judgment. It is also
urged that the court erred and directed the sheriff to release
the property, although there were 6 lamps and some carpets which
were not included in the statement of claim.

We have examined the testimony and are of the opinion
that there was sufficient evidence to sustain the judgment
of the court. We are further of the opinion that the court
did not err in refusing to permit the tax books showing the
property in the name of J. H. Hoover. It may well have been assessed
in his name and still belong to his wife. Moreover, the
would not be bound by the act of the assessor. Reverend v.

The court permitted claimant to amend her statement, which was contained in the notice to the sheriff, so as to include the 6 lamps and the carpets. No written amendment was filed, but we do not consider that it was necessary. This proceeding is statutory and no written pleadings are required. Smeeth-Harwood v. Hutchinson, 175 Ill. App. 602.

The court found title in the plaintiff and claimant Emma Stut and this included the property enumerated in the notice served on the sheriff, together with the items included in the amendment. Moreover, the claim is sufficiently broad in that after enumerating other specific articles, it concludes, "and other personal property now contained in the house, basement and garage and rooms over the garage, located at 1136 Sheridan Road, Wilmette, Illinois." The claim appears to have covered all the property in the hands of the sheriff.

We see no reason for disturbing the judgment of the County Court. Lange v. Stack, et al., 199 Ill. 4pp. 538.

For the reasons stated in this opinion the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

KEBEL AND FRIEND, JJ. CONCUR.

The court permitted plaintiff to amend her statement,

which was contained in the notice to the sheriff, so as to include the 6 lamps and the carpets. No written amendment was filed, but we do not consider that it was necessary. This proceeding is statutory and no written pleadings are required.

Emmett-Kearney v. Hutchinson, 175 Ill. App. 602.

The court found title in the plaintiff and plaintiff

found that and this included the property enumerated in the notice served on the sheriff, together with the items included in the amendment. Moreover, the claim is sufficiently broad in that after enumerating other specific articles, it concludes, "and other personal property now contained in the house,"

basement and garage and room over the garage, located at 1138 Sheridan Road, Evanston, Illinois. The claim appears to have covered all the property in the hands of the sheriff.

We see no reason for disturbing the judgment of the

County Court. James v. Stock et al., 189 Ill. App. 336.

For the reasons stated in this opinion the judgment

of the County Court is affirmed.

JUDGMENT AFFIRMED.

HEARD AND WRITTEN, 21. OCTOBER.

34008

SARAH SMARGON,

(Plaintiff) Appellee,

v.

DAVID ELLIS and S. ELLIS,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 613²

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff took judgment by confession against the defendants on a judgment note dated September 10, 1928, for \$550 with interest at 6% and signed by Golde Goldsmith, Harry Goldsmith, S. Ellis and David Ellis. While the note was for \$550, judgment was entered for \$500, together with attorney's fees for \$100. Fifty dollars had been credited on the note as part payment.

The defendants, David Ellis and S. Ellis filed their petition to vacate the judgment and for leave to come in and plead, which was allowed. They take the position that they signed as sureties and that the note was extended for a valuable consideration without their consent and without their knowledge.

The note having been introduced in evidence by the plaintiff constituted a prima facie case and the burden was then upon the defendants to sustain their defense.

Sarah Smargon, the plaintiff, placed upon the stand by the defendants, testified that she was the owner of the note and that her brother was her agent in the procuring of the note and the passing of the money which constituted the consideration for it. She testified further that her brother represented her in the collection of the note and anything he did in that regard was as her agent.

34008

SAVAN BARRON

(Plaintiff) Appellee

v.

DAVID KILIS and S. KILIS

(Defendants) Appellants

APPEAL FROM

UNITED STATES DISTRICT COURT

OF CHICAGO

312 A. 218

Opinion filed Jan. 28, 1931

MR. CHIEF JUSTICE: Upon delivery of the opinion of

the court.

Plaintiff took judgment by confession against the

defendants on a judgment note dated September 10, 1928, for

\$500 with interest at 6% and signed by Guido Dolanovich, Harry

Dolanovich, S. Kilis and David Kilis. While the note was

for \$500, judgment was entered for \$500, together with

attorney's fees for \$100. Fifty dollars had been credited on

the note as part payment.

The defendants, David Kilis and S. Kilis filed their

petition to vacate the judgment and for leave to come in and

plead, which was allowed. They take the position that they

signed no answer and that the note was extended for a year and

consideration without their consent and without their knowledge.

The note having been introduced in evidence by the

plaintiff constituted a prima facie case and the burden was then

upon the defendants to sustain their defense.

Joseph Barron, the plaintiff, called upon the stand

by the defendants, testified that she was the owner of the note

and that her brother was her agent in the procuring of the note

and the passing of the money which constituted the consideration

for it. She testified further that her brother represented her

in the collection of the note and anything he did in that regard

was as her agent.

David Ellis, one of the defendants, testified that Harry Smargon, plaintiff's brother, and agent in regard to the transaction in question, asked him to sign a new note as an extension for three months and that he refused to do so.

Goldsmith, one of the principals on the note, testified on behalf of the defendants that Ellis refused to sign a new note and so told Smargon.

Harry Smargon, brother of the plaintiff, testified that when the note was made he told Goldsmith he would not give the money to him, but would give it to Ellis. He admitted that \$50 had been received, which had been collected by his mother and which had been applied on the note as part payment, but denied that there was any extension agreement.

From the evidence so far, it is apparent that there was no agreement between the parties to extend the payment of the note, but if defendants' testimony is true, there was a distinct refusal. The only testimony relied upon appears to be that of Goldsmith. He testified that on a certain Saturday evening the plaintiff's mother came to his store and that he told her the best he could do was to give her \$50, as commission; that she said she wanted the money but was satisfied to have the note extended for three months; that thereupon he paid her \$50 for the loan and \$7.50, as interest for the three months. An objection was made on behalf of plaintiff in regard to the conversation of Goldsmith with the mother of the defendant.

Harry Smargon was placed upon the stand by defendants for cross-examination and the following questions asked and answers given:

"Q. Did you get \$50 after that?

A. I did not, but my mother got \$50.

Q. Did you send your mother for it?

A. She talked to him.

MR. SHULMAN: What difference does it make?
he admits having received \$50.

David Allen, one of the interviewers, testified that Harry Morgan, plaintiff's brother, and agent in regard to the transaction in question, asked him to sign a note for an extension for three months and that he refused to do so. Goldsmith, one of the witnesses on the note, testified on behalf of the defendant that Allen refused to sign a new note and so told Morgan. Harry Morgan, brother of the plaintiff, testified that when the note was made he told Goldsmith he would not give the money to him, but would give it to Allen. He admitted that \$50 had been received, which had been collected by his mother and which had been added to the note as part payment, but stated that there was no extension agreement. From the evidence so far, it is apparent that there was no agreement between the parties to extend the payment of the note, but if defendant's testimony is true, there is a distinct refusal. The only testimony which appears to be that of Goldsmith, he testified to on a certain Sunday evening the plaintiff's mother came to his store and that he told her the next he could do was to give her \$50, no commission; that she said she wanted the money but was unwilling to take the note extended for three months; that there was no \$50 for the loan and \$7.50, an interest for the three months. An objection was made on behalf of Allen to the introduction of Goldsmith's testimony with respect to the defendant. Harry Morgan was asked upon the stand by the plaintiff for cross-examination and the following questions were asked:

Examine: Answer:

1. Did you get \$50 after that?
2. I did not, but my mother gave me \$50.
3. Did you send your mother for it?
4. She talked to him.
5. Mr. Sullivan: What difference does it make?
6. He talked to him and returned \$50.

THE COURT: Objection sustained.
MR. KAPLAN: If the court please, counsel admits
having received \$50 through the mother of
the plaintiff.

A. Yes Sir.

MR. SHULMAN: All right."

It appears from the record that Mr. Kaplan represented the defendants.

At the end of all the evidence the court instructed the jury to bring in a verdict for the plaintiff and entered judgment upon the verdict.

This was all the evidence bearing on the question as to whether or not the \$50 payment was a consideration for an extension of the note or part payment. The evidence of Goldsmith setting out an alleged conversation between himself and the mother of the plaintiff was clearly incompetent. It was not in the presence of the plaintiff nor her agent Harry Smargon and there was no testimony in the record showing that the mother had the authority to act for or on behalf of Sarah Smargon, the principal, and plaintiff in this case, in the negotiation of an extension of the note. What the mother may have said was not competent for the purpose of establishing agency on her part. Merchants' Nat. Bank v. Nichols & Co., 223 Ill. 41. The plaintiff in this case was upon the stand, and could have been questioned in regard to the authority of her mother. It is urged that the court should have permitted further cross-examination of Harry Smargon, for the purpose of disclosing the fact of agency, but it does not appear that the court was advised by counsel of his purpose to develop this fact by further examination. He appears to have been satisfied with the result obtained when he elicited the fact that the mother had received \$50, which was not denied. No effort appears to have been made to pursue the examination further.

THE COURT: Objection sustained.
MR. LARSEN: If the court please, counsel submits
having received \$50 through the mother of
the plaintiff.

A. Yes Sir.
MR. LARSEN: All right.

It appears from the record that Mr. Larson represented

the defendant.

At the end of all the evidence the court instructed

the jury to bring in a verdict for the plaintiff and entered

judgment upon the verdict.

There was all the evidence bearing on the question

as to whether or not the \$50 payment was a consideration for an

extension of the note or part payment. The evidence of Goldsmith

settling out an alleged conversation between himself and the

mother of the plaintiff was clearly incompetent. It was not

in the presence of the plaintiff nor her agent Harry Langston and

there was no testimony in the record showing that the mother had

the authority to act for or on behalf of Sarah Langston, the

principal, and plaintiff in this case, in the negotiation of an

extension of the note. What the mother may have said was not

competent for the purpose of establishing agency on her part.

Verdict of the court, \$50.00, for the plaintiff.

In this case was upon the stand, and could have been questioned

in regard to the authority of her mother. It is urged that the

court should have permitted further testimony of Harry

Langston, for the purpose of disclosing the fact of agency, but

it does not appear that the court was advised by counsel of his

purpose to develop this fact by further examination.

It appears to have been satisfied with the result obtained when he

elicited the fact that the mother had received the \$50.

Not denied. No effort appears to have been made to

the examination further.

The trial court in instructing the verdict evidently took into consideration the fact that this testimony was incompetent and that there was not sufficient evidence without this for the jury to consider. It is insisted on behalf of counsel that, where a court instructs a jury to bring in a verdict, every intendment should be indulged in in favor of the testimony of the opposite side. This, however, means only competent evidence. There being none, which we are able to find from the record bearing on this question which we consider competent, we are of the opinion that the court properly instructed the jury and entered judgment on its verdict.

The burden of proof was upon the defendants to establish the defense set up in the petition by a preponderance of the evidence. This they failed to do.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

The trial court in instructing the verdict evidently took into consideration the fact that this testimony was inconsistent and that there was not sufficient evidence without this for the jury to consider. It is insisted on behalf of counsel that where a court instructs a jury to bring in a verdict, every instruction should be brought in in favor of the testimony of the opposite side. This, however, makes only constant evidence. There being none, which we are able to find from the record bearing on this question which we consider correct, we are of the opinion that the court properly instructed the jury and entered judgment on its verdict. The burden of proof was upon the defendants to establish the defense set up in the petition by a preponderance of the evidence. This they failed to do. For the reasons stated in this opinion, the judgment of the municipal court is affirmed.

WILLIAM J. HARRIS

WILLIAM J. HARRIS, JUDGE

34102

FRANK E. DAVIDSON,

Appellant,

v.

WOOD EQUIPMENT CO.,
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

260 I.A. 613³

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the
opinion of the court.

This is an appeal from a decree of the Circuit Court, dismissing complainant's bill of complaint for want of equity. The bill charged that the complainant was a duly licensed architect and that in July, 1918, the defendant, Wood Equipment Co., owned a certain piece of real estate and entered into an oral agreement with the complainant, Frank E. Davidson, by which the complainant was to prepare building plans and preliminary sketches to be used in the erection of a building on the property of the defendant. The bill further alleges that pursuant to said agreement the complainant prepared preliminary drawings for the building to be erected on said property, but that the defendant never proceeded with the building and never paid the complainant for the services. The bill prays that the complainant be declared entitled to a mechanic's lien on the property in question.

The only question involved is as to whether or not an architect is entitled to a lien on a specific piece of property for preparing sketches and architectural plans for the erection of a building thereon which, in fact, was never constructed either in whole or in part. This precise ques-

FRANK E. DAVIDSON,

Appellant,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

WOOD EQUIPMENT CO.,
a corporation,

Appellee.

2001.A.613

Opinion filed Jan. 28, 1931

MR. PRESIDING JUDGE WILSON delivered the

opinion of the court.

This is an appeal from a decree of the Circuit Court, dismissing complainant's bill of complaint for want of equity. The bill charged that the complainant was a duly licensed architect and that in July, 1918, the defendant, Wood Equipment Co., owned a certain piece of real estate and entered into an oral agreement with the complainant, Frank E. Davidson, by which the complainant was to prepare building plans and preliminary sketches to be used in the erection of a building on the property of the defendant. The bill further alleged that pursuant to said agreement the complainant prepared preliminary drawings for the building to be erected on said property, but that the defendant never proceeded with the building and never paid the complainant for the services. The bill prays that the complainant be declared entitled to a mechanic's lien on the property in question.

The only question involved is as to whether or not an architect is entitled to a lien on a specific piece of property for preparing sketches and architectural plans for the erection of a building thereon which, in fact, was never constructed either in whole or in part. This precise ques-

tion has been before the Supreme Court of this state and settled in the case of Crowen v. Meyer, 342 Ill. 46. In that case the Supreme Court held that under circumstances similar to those involved in this proceeding, the architect was entitled to a lien for services rendered as an architect inasmuch as the services were intended to improve the property in question. This right is based upon Section 1 of the Mechanic's Lien Act, Smith-Hurd Illinois Revised Statutes of 1929, page 1812, which provides specifically for liens in favor of architects and structural engineers.

The Supreme Court of this state in the case of Crowen v. Meyer, supra, has established as the law of this state the proposition that the architect, under facts similar to those in this case, is entitled to a lien for services and we are bound by that opinion.

For the reasons stated in this opinion, the decree of the Circuit Court dismissing complainant's bill for want of equity is reversed and the cause remanded to the Circuit Court with directions to proceed in accordance with this opinion and to enter its decree in favor of the complainant, together with the costs of the proceeding.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEEKL, J. CONCURS;
FRIEND, J. NOT PARTICIPATING.

tion has been before the Supreme Court of this state and settled in the case of Crown v. Meyer, 243 Ill. 46. In that case the Supreme Court held that under circumstances similar to those involved in this proceeding, the architect was entitled to a lien for services rendered as an architect inasmuch as the services were intended to improve the property in question. This ruling is based upon Section 1 of the Mechanical Lien Act, which reads: "Illinois Revised Statutes of 1925, page 1815, which provides specifically for liens in favor of architects and structural engineers."

The Supreme Court of this state in the case of Crown v. Meyer, 243 Ill. 46, has established as the law of this state the proposition that the architect, under facts similar to those in this case, is entitled to a lien for services and we are bound by that opinion.

For the reasons stated in this opinion, the decree of the Circuit Court dissolving partnership is affirmed and the decree is reversed and the cases remanded to the Circuit Court with directions to proceed in accordance with this opinion and to enter its decree in favor of the architect, together with the costs of the proceedings.

WILLIAM H. HARRIS, Clerk of Court.

RECORDED & INDEXED
JULY 1, 1925
NOT RECORDED

34370

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

OLLIE SANFORD,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 613⁴

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment against the defendant Ollie Sanford, finding him guilty of the offense of pandering. The cause was tried by the court without a jury and the defendant sentenced to the House of Correction in the City of Chicago for six months and to pay a fine of \$300 and costs.

The information charged that the defendant on or about the 15th day of December, 1928, in the City of Chicago, did unlawfully and wilfully, without lawful consideration, take, accept and receive a certain sum of money, to-wit: Two (\$2.00) Dollars from Helen Karozewski, a certain female person, which said money was a part of the earnings of the said Helen Karozewski from the practice by her of prostitution. Charges further that the defendant is guilty of the crime of pandering, contrary to the statute in such case made and provided.

The information was signed and sworn to on information and belief by Timothy Dwyer, a police officer. A motion to quash was made on the ground that the complaint is too general; does not sufficiently apprise the defendant of the things charged; does not set forth the amount of money or by whom given and does not specify the place where these intercourses took place, nor with whom.

34370

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

OLLIE BARBARD,

Plaintiff in Error.

KNOW TO

MINISTIAL COURT

OF CHICAGO.

200 L.A. 618

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE ALLEN delivered the opinion

of the court.

This is an appeal from a judgment against the defendant Ollie Barbard, finding him guilty of the offense of pandering. The case was tried by the court without a jury and the defendant sentenced to the House of Correction in the City of Chicago for six months and to pay a fine of \$500 and costs.

The information charged that the defendant on or about the 15th day of December, 1928, in the City of Chicago, did unlawfully and wilfully, without lawful consideration, take, accept and receive a certain sum of money, to-wit: Two (\$2.00) Dollars from Helen Karczewski, a certain female person, which said money was a part of the earnings of the said Helen Karczewski from the practice by her of prostitution. Charges further that the defendant is guilty of the crime of pandering, contrary to the statute in such case made and provided.

The information was signed and sworn to as information and belief by Timothy Dwyer, a police officer. A motion to quash was made on the ground that the complaint is too general; does not sufficiently advise the defendant of the things charged; does not set forth the amount of money or by whom given and does not specify the place where these intercourse took place, nor with whom.

The motion to quash was overruled, and we believe properly so. The information was sufficiently definite as to time, place and amount of money received. A plea of not guilty was entered by the defendant and the cause proceeded to trial.

While Dwyer, the prosecuting witness, was upon the stand it developed that he had signed the information upon information and belief. A motion to quash was made on the ground that the complainant at the time he signed the information did not have direct knowledge as to the facts sworn to. No motion to withdraw the plea of not guilty was made before this motion to quash. A motion to quash after plea can not be considered unless permission is obtained to withdraw the plea. The People v. Munday, 280 Ill. 32; McKevitt v. The People 208 Ill. 460; The People v. Smith, 318 Ill. 114; The People v. Duvveionck, 337 Ill. 636.

Helen Karozewski testified that she had lived in Chicago for about a year and a half; that she became acquainted with the defendant about December 5, 1928; that she saw him again about December 10th of the same year at the Huntington Hotel; that she had intercourse with him at that place; that he told her he would find a place for her to work and took her to a place called "Sophie's" at 3519 Indiana avenue; that she was driven there in a car operated by a man by the name of Leon Hill and that the defendant was with her in the car at the time; that she had intercourse with men at that address and collected money from them and that she gave the defendant part of the money collected by her from these acts of intercourse.

The defendant admitted that he had met Helen Karozewski at the Huntington Hotel, as did also Leon Hill. Hill denied that he drove her to the Indiana avenue address and the defendant denied that he ever asked her to go to this place and denied

The motion to quash was overruled, and we believe properly so. The information was sufficiently definite as to time, place and amount of money received. A plea of not guilty was entered by the defendant and the cause proceeded to trial. While Taylor, the prosecuting witness, was upon the

stand it developed that he had signed the information upon information and belief. A motion to quash was made on the ground that the complainant at the time he signed the information did not have direct knowledge as to the facts sworn to. No motion to withdraw the plea of not guilty was made before this motion to quash. A motion to quash after plea can not be considered unless permission is obtained to withdraw the plea. The People v. Murphy, 330 Ill. 53; People v. Wexler, 330 Ill. 453; The People v. Smith, 318 Ill. 114; The People v. Pryor, 337 Ill. 335.

Helene Karszewski testified that she had lived in Chicago for about a year and a half; that she became acquainted with the defendant about December 2, 1935; that she saw him again about December 15th of the same year at the Huntington Hotel; that she had intercourse with him at that place; that he told her he would find a place for her to live and took her to a place called "Columbia" at 3415 L Street Avenue; that she was driven there in a car operated by a man by the name of Leon Hill and that the defendant was with her in the car at the time; that she had intercourse with him at that address and collected money from them and that she gave the defendant part of the money collected by her from these acts of intercourse.

The defendant admitted that he had met Helene Karszewski at the Huntington Hotel, as did also Leon Hill. Hill testified that he drove her to the Indiana Avenue address and the defendant denied that he ever asked her to go to this place and denied

ever having received any money from her. Two or three witnesses testified as to the good character of the defendant.

The trial court had an opportunity of seeing and hearing the witnesses and forming his opinion as to the weight of their testimony. A court of review should not disturb the finding and judgment of the trial court in cases of this character, unless the evidence is unreasonable or improbable or so unsatisfactory as to warrant a reasonable doubt of guilt. People v. Wolf, 334 Illinois 218; People v. Hicketts, 324 Ill.170. The evidence of the girl, standing alone, amply warrants a conviction. The trial court found that this testimony was not overcome by that of the defendant's and that the defendant was guilty of the acts charged in the information. There being no jury, we assume that the court considered only such evidence as was competent and we find no error in the trial court sufficient to warrant a reversal of the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

ever having received any money from her. Two or three witnesses testified as to the good character of the defendant.

The trial court had an opportunity of seeing and hearing the witnesses and forming his opinion as to the weight of their testimony. A court of review should not disturb the

finding and judgment of the trial court in cases of this character, unless the evidence is unreasonable or impossible or so unsatisfactory as to warrant a reasonable doubt of guilt.

People v. Wolf, 324 Illinois 515; People v. Hinkle, 324 Ill. 1170.

The evidence of the first, standing alone, amply warranted a conviction. The trial court found that this testimony was not overcome by that of the defendant's and that the defendant was guilty of the acts charged in the information. There being no jury, we assume that the court considered only such evidence as was competent and we find no error in the trial court's judgment to return a reversal of the judgment.

For the reasons stated in this opinion, the judgment of the municipal court is affirmed.

JUSTICE DELANEY.

WELLS AND DELANEY, JJ. 1927.

34390

CLARENCE HALL,
Administrator, etc.,

Appellee,

v.

EVENING AMERICAN PUBLISHING
COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

260 I.A. 614'

Opinion filed Jan. 28, 1921

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

The plaintiff Clarence Hall, as administrator of
the estate of James Hall, deceased, brought this action
against the Evening American Publishing Company, defendant,
to recover for damages suffered by the next of kin, by reason
of the death of the deceased from injuries received by reason
of the negligence of the defendant in operating one of its
trucks over and along Root street in the City of Chicago on
the 28th day of March 1930. A trial was had with a jury,
resulting in a verdict for \$5,000 in favor of the plaintiff
and against the defendant, on which verdict judgment was entered
and an appeal prayed and allowed to this court.

Plaintiff's testate at the time of the accident was
a child of six years of age who was crossing Root street at
a point between Federal and Dearborn streets, two intersecting
streets in the City of Chicago.

According to the testimony of Tarantine, a witness
called on behalf of the plaintiff, the boy was crossing the
street from the south side to the north side, carrying a box
which he placed upon the north side of the street and then
started to go back across the street; that there were two car

34320

CLARENCE HALL,
Administrator, etc.,

Appellee,

v.

EVERING LITHOGRAPH PUBLISHING
COMPANY,
Appellant.

COOK COUNTY.

2201 A. 614

Opinion filed Jan. 28, 1931

MR. JUSTICE HENRY WILSON delivered the opinion

of the court.

The plaintiff Clarence Hall, as administrator of

the estate of James Hall, deceased, brought this action

against the Evering Lithograph Publishing Company, defendant,

to recover for damages suffered by the next of kin, by reason

of the death of the deceased from injuries received by reason

of the negligence of the defendant in operating one of its

trucks over and along West street in the city of Chicago on

the 28th day of March 1930. A trial was had with a jury,

resulting in a verdict for \$5,000 in favor of the plaintiff

and against the defendant, on which verdict judgment was entered

and an appeal prayed and allowed to this court.

The plaintiff's estate at the time of the accident was

a child of six years of age who was crossing West street at

a point between Federal and Dearborn streets, two intersecting

streets in the city of Chicago.

According to the testimony of Lawrence, a witness

called on behalf of the plaintiff, the boy was crossing the

street from the north side to the south side, carrying a box

which he placed upon the north side of the street and then

started to go back across the street; that there were two cars

lines on the street, one eastbound and one westbound; that the boy was near the north rail of the eastbound track when the defendant's truck hit him; that at the time there were no cars parked along the street at that place nor any wagon or vehicle of any kind; that a motor car had passed prior to the time of the accident, but there was no car other than the defendant's motor truck near the boy at the time he was struck. That after the accident he saw a trail of blood which was in the neighborhood of 25 or 27 steps from the place where plaintiff's intestate was struck; that the witness had been driving a car himself for sometime and estimated the speed of the truck at 35 or 40 miles an hour and that the defendant's truck skidded 25 or 30 feet after the brakes were put on.

Powell, another witness called on behalf of the plaintiff, testified to practically the same facts.

Hamilton, a witness called on behalf of the defendant, testified that he was working for Nashan, the driver of defendant's truck and was riding with him at the time of the accident; that the boy ran out from between two big laundry trucks that were parked on the side of the street; that there were a lot of cars and one of them was backing out of the Pullman yards which were located at that point; that defendant's truck went about 6 feet after he first saw the boy run out; that the boy was holding an orange box in front of him at the time.

Nashan, the driver of the truck and employed by the defendant, testified that there were Morgan laundry trucks and a lot of touring cars parked along the street and that he was going 15 miles an hour; that he suddenly saw the boy come out from between the two trucks; that the boy was about three feet ahead of him when he first saw him and that he ran about six feet after striking him.

lines on the street, one eastbound and one westbound; that the boy was near the north tail of the eastbound track when the defendant struck him; that at the time there were no cars parked along the street at that place nor any wagon or vehicle of any kind; that a motor car had passed prior to the time of the accident, but there was no car other than the defendant's motor truck near the boy at the time he was struck. That after the accident he saw a trail of blood which was in the neighborhood of 25 or 27 steps from the place where plaintiff's intestate was struck; that the witness had been driving a car himself for sometime and estimated the speed of the truck at 25 or 40 miles an hour and that the defendant's truck skidded 25 or 30 feet after the brakes were put on.

Nowell, another witness called on behalf of the plaintiff, testified to practically the same facts.

Hamilton, a witness called on behalf of the defendant, testified that he was working for Nathan, the driver of defendant's truck and was riding with him at the time of the accident; that the day ran out from between two big laundry trucks that were parked on the side of the street; that there were a lot of cars and one of them was backing out of the British yards which were located at that point; that defendant's truck went about 6 feet after he first saw the boy run out; that the boy was holding an orange box in front of him at the time.

Nathan, the driver of the truck and employed by the defendant, testified that there were Morgan laundry trucks and a lot of laundry cars parked along the street and that he was going in lines as he went; that he suddenly saw the boy come out from between the two trucks; that the boy was about three feet ahead of him when he first saw him and that he ran about six feet after striking him.

A witness Mezrich Carter was called on behalf of the plaintiff. It appears that this witness also testified at the Coroner's inquest. Considerable stress is laid upon the fact that the testimony of this witness at the Coroner's inquest differs materially from that given on the trial of this cause. Without this evidence there was ample testimony from the other witnesses in the case on behalf of the plaintiff to support the verdict.

One of the points raised by counsel for defendant is that the verdict is against the weight of the evidence. We are unable to agree with this position as we find sufficient evidence in the record to sustain the verdict and judgment.

We are asked to reverse the judgment on the ground that the verdict is excessive. This was a question of fact for the jury and we cannot say, under the facts, that it is excessive. Plaintiff's intestate was a boy six years of age and left him surviving, his mother, father, sisters and brothers. It is within the province of the jury to fix the damages within the statutory limitations. Bowman v. Woodway Stores, Inc., 258 Ill. App. 307; Nelson v. Stutz Chicago Factory Branch, 254 Ill. App. 526; Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

We are asked to reverse because of improper remarks addressed to the jury by counsel for plaintiff in the course of his argument. Among other things, counsel stated to the jury that the boy could not be guilty of any negligence. On objection by counsel the court corrected the remark and stated that, under the law, a child of seven years was incapable of contributory negligence. The defendant offered and they were given 16 instructions on the law as to what the plaintiff should prove before he was able to recover. Among other things,

plaintiff's counsel stated in his argument to the jury that they probably had never seen any mail or paper trucks go slowly. On objection of counsel for defendant, this was stricken out by the court. Another statement of counsel's as to what the law was with relation to the rate of speed was objected to and the objection sustained. We find no objections to any other remarks of counsel in the record and we do not consider these remarks of counsel to the jury, when coupled with the action of the court in sustaining objection thereto, sufficient to constitute a reversal.

The testimony given by the witness Carter, differed considerably at the trial from that which was given by the same witness at the Coroner's inquest. Counsel for the defendant contends that, while the credibility of a witness is for the jury and it is for them to take into consideration the weight of such evidence; "nevertheless, this rule applies only where there has been no undue intervention by the court, without errors in instructions and without misconduct of counsel." (Quoting from defendant's brief.)

Plaintiff offered two instructions which were given and defendant offered 16 instructions which were given. No error was pointed out in the giving of either of plaintiff's instructions, nor is any point made as to them. We have already stated that we found no misconduct of counsel. The undue intervention by the court, if any, consisted in the fact that when the witness was asked to answer "yes" or "no" to certain impeaching questions, he answered that he was confused. Thereupon, counsel for the defendant insisted that the witness should either answer "yes" or "no" or "I don't remember", and thereupon the court ruled as follows:

"The Court: I will rule with you counsel, on that. Let him answer 'yes' or 'no' or 'I don't remember'."

plaintiff's counsel stated in his argument to the jury that they probably had never seen any mail or paper trials so slowly. On objection of counsel for defendant, this was stricken out by the court. Another statement of counsel's as to what the law was with relation to the rate of speed was objected to and the objection sustained. He found no objection to any other remarks of counsel in the record and we do not consider these remarks of counsel to the jury, when coupled with the action of the court in sustaining objection thereto, sufficient to constitute a reversal.

The testimony given by the witness Gordon, differed considerably at the trial from that which was given by the same witness at the coroner's inquest. Counsel for the defendant contends that, while the credibility of a witness is for the jury and it is for them to take into consideration the weight of such evidence; nevertheless, this rule applies only where there has been no undue intervention by the court, without errors in instructions and without misconduct of counsel." (Quoting from defendant's brief.)

Plaintiff offered two instructions which were given and defendant offered 16 instructions which were given. No error was pointed out in the giving of either of plaintiff's instructions, nor is any point made as to them. We have already stated that we found no misconduct of counsel. The undue intervention by the court, if any, contained in the fact that when the witness was asked to answer "yes" or "no" to certain leading questions, he answered that he was confused. Thereupon counsel for the defendant insisted that the witness should either answer "yes" or "no" or "I don't remember," and thereupon the court ruled as follows:

"The Court: I will rule with you counsel, on that. Let him answer 'yes' or 'no' or 'I don't remember'."

We fail to see what more counsel could have desired. The ruling was in his favor and certainly was not helpful to the plaintiff or the testimony of plaintiff's witness. We see nothing in the conduct of the court which in any way tended to prejudice the defendant. The case consumed considerable time in the trial and a number of witnesses were on the stand and cross-examined at length. We have read the record and feel that it is free from material error, either in respect to the conduct of the court or of counsel, which would call for a reversal. We see no reason for disturbing the judgment of the Circuit Court.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR..

we fail to see what more counsel could have desired. The ruling was in his favor and certainly was not helpful to the plaintiff or the testimony of plaintiff's witness. We see nothing in the conduct of the court which in any way tended to prejudice the defendant. The case concerned considerable time in the trial and a number of witnesses were on the stand and cross-examined at length. We have read the record and feel that it is free from material error, either in respect to the conduct of the court or of counsel, which would call for a reversal. We see no reason for disturbing the judgment of the Circuit Court.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RECORDED AND INDEXED, 12. 1908.

34437

HUBBARD & COMPANY,

Appellee,

v.

BURGE ICE MACHINE CO.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 614²

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff Hubbard & Company brought this action against the defendant Burge Ice Machine Co., to recover for work and labor performed upon certain pipes and coils furnished by the defendant, together with the cost of freight and express paid out by the plaintiff on the pipes and coils delivered.

From the facts it appears that the defendant was engaged in constructing refrigerating plants and in 1927, purchased certain coils and pipes from the Acme Welded Pipe & Coil Company of Jackson, Michigan, and directed that company to ship them directly to the plaintiff. Plaintiff at the time was engaged in the business of galvanizing such pipes and coils for others. The particular coils and pipes in question were galvanized by the plaintiff and delivered to the defendant. The defendant's affidavit of merits to plaintiff's statement of claim charges that the plaintiff agreed to do the galvanizing work in a careful and proper manner; that a large part of the work was performed in a careless and improper manner so that the coils were injured and damaged; that a number of them had to be removed from refrigerating plants, where they had been placed by the defendant, and as a result the plaintiff became indebted to the defendant in a set-off.

ALL FROM

HUGHES & COMPANY

Appellant

MEMORIAL COURT

OF CHICAGO

200 L.A. 614

BUREAU FOR MACHINE CO.

Appellant

Opinion filed Jan. 28, 1931

MR. JUSTICE DELIVERED THE

opinion of the court.

The plaintiff Hubbard & Company brought this action

against the defendant Burke Ice Machine Co., to recover for

work and labor performed upon certain pipes and coils furnished

by the defendant, together with the cost of freight and

express paid out by the plaintiff on the pipes and coils

delivered.

From the facts it appears that the defendant was

engaged in constructing refrigerating plants and in 1927,

purchased certain coils and pipes from the same source as the

A Coil Company of Jackson, Michigan, and directed that company

to ship them directly to the plaintiff. Plaintiff at the time

was engaged in the business of delivering such pipes and

coils for others. The defendant coils and pipes in question

were delivered by the plaintiff and delivered to the defendant.

The defendant's affidavit of service to plaintiff's attorney

of date charges that the plaintiff owed to the defendant

work in a careful and proper manner; that a large part of the

work was performed in a careless and improper manner so that

the coils were injured and damaged; that a number of pipes

had to be removed from refrigerator tanks where they had

been placed by the defendant, and as a result the plaintiff

became indebted to the defendant in a set-off.

The plaintiff on the trial of the case introduced testimony for the purpose of showing that the work was performed in a proper and workmanlike manner and that the fault, if any, was the fault of the Acme Welded Pipe & Coil Company in failing to bend the coils while hot; that in the opinion of the witnesses for the plaintiff the Acme Welded Pipe & Coil Company had attempted to bend the coils while cold and, as a result, they became cracked and broken. Testimony was introduced showing that the plaintiff suggested to the Acme Company that the coils be strapped more securely, and that the plaintiff exercised every care in its efforts to perform the work under the circumstances in a proper manner. That the fault, if any, was not the fault of the plaintiff, but of the Acme Welded Pipe & Coil Company.

On the trial plaintiff offered to introduce in evidence testimony to the effect that in forty or more of the jobs where there were installations in refrigerating plants of pipes and coils galvanized by the plaintiff, there was found galvanizing material on the inside of the pipes or coils near the curve or bend of the coils, in the middle of the pipe and in various other parts of the pipe; that in many cases there was so much of the galvanizing material that the ammonia and fluid used in refrigerating plants could not pass through; that it was impossible to use the coils because of this obstruction; that it was necessary to remove these pipes and replace them with others; that the defendants contracted to do these jobs for the refrigerating plants at a certain price and because of the necessity of removing and furnishing other coils, there was added an increased cost to the defendant; that the fair and reasonable cost of repair and material for

The plaintiff on the trial of the case introduced testimony for the purpose of showing that the work was performed in a proper and workmanlike manner and that the fault, if any, was the fault of the same welded pipe & Golf Company in failing to bend the coils while hot; that in the opinion of the witnesses for the plaintiff the same welded pipe & Golf Company had attempted to bend the coils while cold and, as a result, they became cracked and broken. Testimony was introduced showing that the plaintiff suggested to the same company that the coils be straightened more slowly, and that the plaintiff exercised every care in its efforts to perform the work under the circumstances in a proper manner. That the fault, if any, was not the fault of the plaintiff, but of the same welded pipe & Golf Company.

On the trial plaintiff offered to introduce in evidence testimony to the effect that in forty or more of the jobs where there were installations in refrigerating plants of pipes and coils furnished by the plaintiff, there was found galvanizing material on the inside of the pipes or coils near the curve or bend of the coils, in the middle of the pipe and in various other parts of the pipe; that in many cases there was so much of the galvanizing material that the ammonia and fluid used in refrigerating plants could not pass through; that it was impossible to use the coils because of this condition; that it was necessary to remove these pipes and replace them with others; that the defendant conspired to do these jobs for the refrigerating plants at a certain price and because of the necessity of removing and installing other coils, there was added an increased cost to the defendant; that the fair and reasonable cost of repair and material for

replacing the defective coils was \$3,859.50; that it employed the usual and customary methods in the installation of the coils in these different plants.

The court sustained an objection to the proffered testimony and to this ruling the defendant objected and saved its exception. (The cause was submitted to a jury and a verdict returned in favor of the plaintiff for \$1,256.26. Judgment was entered upon this verdict and this appeal taken.) We are of the opinion that the court erred in refusing to permit the testimony offered to be admitted in evidence. The fact that a large number of the pipes and coils contained galvanizing material, which clogged the flow of ammonia and other fluids such as is used in refrigerating plants, had a direct bearing on the question as to whether or not plaintiff had galvanized the coils and pipes in a proper and workmanlike manner. If, as a matter of fact, galvanizing material was found in the pipes in other portions than in the bend or curve, it would also indicate that the fault was not entirely the fault of the Acme Welded Pipe & Coil Company. Plaintiff insisted that the testimony shows that the work was done in a proper and workmanlike manner and a jury may have so found, but the defendant had the right to present for consideration the fact, which if it was a fact would indicate, that there was so much material in the pipes that the work had not been properly performed.

Defendant's principal defense appears to have been that the pipes and coils when placed in refrigerating plants, were not usable for the purpose for which they were intended. By the ruling of the court this question was removed from the consideration of the jury. We are of the opinion that the

requiring the defective coils was \$2,825.00; that it employed the usual and customary methods in the installation of the coils in these different plants.

The court sustained an objection to the proffered testimony and to this ruling the defendant objected and moved its exception. (The case was submitted to a jury and a verdict returned in favor of the plaintiff for \$1,356.25.) Judgment was entered upon this verdict and this appeal taken.) We are of the opinion that the court erred in refusing to permit the testimony offered to be admitted in evidence. The fact that a large number of the pipes and coils contained galvanizing material, which clogged the flow of ammonia and other fluids such as is used in refrigerating plants, had a direct bearing on the question as to whether or not plaintiff had delivered the coils and pipes in a proper and workmanlike manner. If, as a matter of fact, galvanizing material was found in the pipes in other portions than in the bend or curve, it would also indicate that the coils were not entirely the fault of the ammonia pipe & coil company. Plaintiff insisted that the testimony shows that the work was done in a proper and workmanlike manner and a jury may have so found but the defendant had the right to present for consideration the fact, which it is now sought to indicate, that there was no such material in the pipes that the work had not been properly delivered.

Defendant's principal witness appears to have been that the pipes and coils were placed in refrigerating plants, were not suitable for the purpose for which they were intended. By the ruling of the court this question was removed from the consideration of the jury. We are of the opinion that the

testimony was properly admissible.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND FRIED, JJ. CONCUR.

testimony was properly admitted.
For the reasons stated in this opinion, the
judgment of the Municipal Court is reversed and the cause
is remanded for a new trial.

INQUEST RETURNED AND CAUSE REMANDED.

HENRI AND JOSEPH, JR. CORP.

34442

MARION C. MORNING,
Appellee,

v.

FRUEHAUF TRAILER CO.,
a Corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.
200 I.A. 614³

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Plaintiff Marion C. Morning brought his action in
trover against the defendant Fruehauf Trailer Co., a corporation,
and obtained a judgment for \$750 and costs.

From the facts it appears that the plaintiff pur-
chased a trailer from a man by the name of Newberry, doing
business as the American Motorized Transport Company. Purchase
was made on the 26th day of March, 1929, for the sum of \$750.
Of this amount \$535.55 was paid in cash, as evidenced by a
canceled check introduced in evidence, marked plaintiff's
exhibit 1. The balance was deducted over a period of months.
Plaintiff at the time was engaged in work for Newberry. On
November 20, 1929, the defendant Fruehauf Trailer Co. took
possession of the trailer without process of law and without
the knowledge of the plaintiff. This action was brought to
recover its value.

On the trial of the case defendant introduced in
evidence a conditional sales contract and also a rental agree-
ment. It is claimed that the trailer in question was sold to
Newberry under the conditional sales agreement dated July 5,
1929, and on a breach of the contract was rented or leased to

34443

HARION G. HORNELL,

Appellee,

v.

FRANKLIN TRAILER CO.,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

2701A.614

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion

of the court.

Plaintiff Harion G. Hornell brought his action in

trover against the defendant Franklin Trailer Co., a corporation,

and obtained a judgment for \$750 and costs.

From the facts it appears that the plaintiff pur-

chased a trailer from a man by the name of Newberry, doing

business as the American Motorized Transport Company. Purchase

was made on the 28th day of March, 1929, for the sum of \$750.

Of this amount \$275.00 was paid in cash, as evidenced by a

cancelled check introduced in evidence, marked plaintiff's

exhibit 1. The balance was debited over a period of months.

Plaintiff at the time was engaged in work for Newberry. On

November 30, 1929, the defendant Franklin Trailer Co. took

possession of the trailer without process of law and without

the knowledge of the plaintiff. This action was brought to

recover its value.

On the trial of the case defendant introduced in

evidence a conditional sales contract and also a rental agree-

ment. It is claimed that the trailer in question was sold to

Newberry under the conditional sales agreement dated July 5,

1929, and on a breach of the contract was rented or leased to

him under the second instrument dated September 18, 1929. It is apparent that both of these documents bore dates later than the date of the purchase of the trailer by the plaintiff.

Jacobs, a witness on behalf of the defendant, testified that they had a contract or agreement concerning this trailer prior to March 26, 1929, but the contract was not in evidence and there is nothing to show in the record whether it was a conditional sales contract, or whether it covered the trailer in question. On cross-examination the witness testified that he did not make the deal himself and did not know whether he was or was not present when the contract was signed.

It appears from the record that contracts were renewed from time to time to cover additional trailers purchased. So far as the record discloses, the purchase price on this particular trailer may have been fully paid.

Testimony was introduced as to the value of the trailer and it is insisted on the part of the defendant that there was no competent evidence as to the value of the trailer. The cause was tried by the court without a jury and from the facts it appears that the trailer originally cost \$1200. Plaintiff testified that he had priced trailers before, but never one similar to the one in question. He stated that he had an opinion as to its value and that, in his opinion, it was worth \$800.

Beattie, a witness for defendant, testified that he talked with plaintiff prior to the time they took possession of the trailer and told plaintiff he would sell him this particular trailer for \$1100; that this particular trailer sold in Chicago for \$1670; that he told the plaintiff it was worth \$1100.

him under the second instrument dated September 18, 1933. It is apparent that both of these documents were dated later than the date of the purchase of the trailer by the plaintiff.

Jacobs, a witness on behalf of the defendant, testified that they had a contract or agreement concerning this trailer prior to March 28, 1935, but the contract was not in evidence and there is nothing to show in the record whether it was a conditional sales contract, or whether it covered the trailer in question. On cross-examination the witness testified that he did not make the deal himself and did not know whether he was or was not present when the contract was signed.

It appears from the record that contracts were renewed from time to time to cover additional trailers purchased. So far as the record discloses, the purchase price on this particular trailer may have been fully paid. Testimony was introduced as to the value of the trailer and it is insisted on the part of the defendant that there was no competent evidence as to the value of the trailer. The case was tried by the court without a jury and from the facts it appears that the trailer originally cost \$1300. Plaintiff testified that he had priced trailers before, but never one similar to the one in question. He stated that he had an opinion as to its value and that, in his opinion, it was worth \$300.

Bestie, a witness for defendant, testified that he talked with plaintiff prior to the time they took possession of the trailer and told plaintiff he would sell him this particular trailer for \$1100; that this particular trailer sold in Chicago for \$1270; that he told the plaintiff it was worth \$1100.

We are of the opinion that there was sufficient evidence in the record from which the court could arrive at its finding as to the value. We see no reason for reversing the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

We are of the opinion that there was sufficient evidence in the record from which the court could arrive at its finding as to the value. We see no reason for reversing the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

THOMAS A. LEBLANC.

HISBELL AND FRIED, JJ. CONCUR.

33981

CATHERINE LAFFEY,

Defendant in Error,

v.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,

Plaintiff in Error.

WRIT OF ERROR

TO MUNICIPAL COURT

OF CHICAGO.

260 I.A. 614⁴

Opinion filed Jan. 28, 1931

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment for \$300 entered in the Municipal Court of Chicago, pursuant to a hearing upon stipulated facts, showing in substance, that P.J. Laffey became a member of the United Brotherhood of Carpenters and Joiners of America on February 21, 1899, and continued as a member until the date of his death on November 12, 1927; that at the time of his death and for a considerable period previous thereto there were in effect certain provisions of the constitution and by-laws of the order as follows:

"Section 48A. On the death of a member in good standing, his wife or legal heirs, as named on his Application, shall be entitled to the member's funeral donation as prescribed in the Constitution and Laws of the United Brotherhood.

Section 45A. When a member owes a sum equal to three months dues, he is not in good standing and is thereby suspended from all donations and will not again be entitled to donations until three months from the date he has paid said arrearages which payment must include the payment of dues for the month in which said payment is made.

Section 49B. A beneficial member will be entitled to the donations as prescribed in the Constitution and Laws of the United Brotherhood; provided he is over one year a contributing or financial member in good standing, and when three months in arrears, he shall be debarred from all donations until three months after all arrearages are paid in full, including the current month.

Section 49C. Beneficial members' donation shall be:

CATHARINE LARRY,

Defendant in Error,

v.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,

Plaintiff in Error.

TO MUNICIPAL COURT

OF CHICAGO.

2001.A.614

Opinion filed Jan. 28, 1931

MR. JUSTICE BRIDGES delivered the opinion of the court.

By this writ of error defendant seeks to reverse a judgment for \$200 entered in the Municipal Court of Chicago, pursuant to a hearing upon stipulated facts, showing in substance, that P. A. Bailey became a member of the United Brotherhood of Carpenters and Joiners of America on February 21, 1929, and continued as a member until the date of his death on November 13, 1937; that at the time of his death and for a considerable period previous thereto there were in effect certain provisions of the constitution and by-laws of the order as follows:

"Section 18A. On the death of a member in good standing, his wife or legal heirs, as named on his application, shall be entitled to the member's funeral expenses as provided in the Constitution and Laws of the United Brotherhood.

"Section 42. When a member owes a sum equal to three months dues, he is not in good standing and is there by suspended from all donations and will not again be entitled to donations until three months from the date he has paid arrears, which payment must include the payment of dues for the month in which said payment is made.

"Section 43A. A nonofficial member will be entitled to the donations as provided in the Constitution and Laws of the United Brotherhood; provided he is over one year a contributing or financial member in good standing, and when three months in arrears, he shall be debited from all donations until three months after all arrears are paid in full, including the current month.

"Section 43B. Nonofficial members' donation shall

One year's membership - - - - -	\$ 50.00
Two years' membership - - - - -	100.00
Three years' membership - - - - -	150.00
Four years' membership - - - - -	200.00
Five years' membership - - - - -	300.00"

On November 10, 1927, two days previous to his death, P. J. Laffey paid to one Brims, Financial Secretary of Local Union 13 of the Brotherhood, the sum of \$9.00 for dues and assessments for the months of July, August, September, October, November and December of 1927, and a quarterly working card was thereupon issued to him by Local Union 13 for the months of October, November and December 1927.

Upon the death of P. J. Laffey, Catherine Laffey, his widow, notified the Local Union of his death, and was thereafter notified by said Union that she was not entitled to a funeral donation, as set forth in the By-laws, whereupon this suit was instituted.

The several points appearing in the brief can effectually be disposed of by a consideration of the question: Was Laffey a member in good standing at the time of his death? If so, his widow, the plaintiff, is entitled to the member's funeral donation as provided in the constitution and by-laws.

This court has heretofore had occasion to pass upon substantially the same question based upon facts almost identical with the instant case. (Blais v. United Brotherhood of Carpenters and Joiners of America, 169 Ill. App. 596.) The evidence in that case showed that Blais died on February 14, 1909. There, as here, his wife paid several months' arrearages in dues only three days before Blais' death, for which, as here, a quarterly working card bearing the stamp of the Financial Secretary was issued to him. The refusal of the Union to pay the funeral donation was based upon sections of defendant's by-laws containing substantially the same provisions as those above set forth, and the court in passing upon the immediate

One year's membership	50.00
Two years' membership	100.00
Three years' membership	150.00
Four years' membership	200.00
Five years' membership	250.00

(On November 10, 1937, two days previous to his death,

F. J. Laffey paid to one James, Financial Secretary of Local

Union 13 of the Brotherhood, the sum of \$5.00 for dues and

assessments for the months of July, August, September, October,

November and December of 1937, and a quarterly working card

was thereupon issued to him by Local Union 13 for the months

of October, November and December 1937.

Upon the death of F. J. Laffey, Catherine Laffey,

his widow, notified the Local Union of his death, and was

thereafter notified by said Union that she was not entitled

to a funeral donation, as set forth in the By-laws, whereupon

this suit was instituted.

The several points appearing in the brief can effect-

ually be disposed of by a consideration of the question: as

whether a member in good standing at the time of his death is

so, his widow, the plaintiff, is entitled to the member's

funeral donation as provided in the constitution and by-laws.

This court has heretofore had occasion to pass upon

substantially the same question based upon facts almost identical

with the instant case. (Smith v. United Brotherhood of

Carpenters and Joiners of America, 189 Ill. App. 546.) The

evidence in that case showed that Smith died on February 14,

1938. There, as here, his wife paid several months' assessments

in less than three days before Smith's death, for which, as here,

a quarterly working card bearing the stamp of the Financial

Secretary was issued to him. The refusal of the Union to pay

the funeral donation was based upon sections of the constitution

by-laws containing substantially the same provisions as those

above set forth, and the court in passing upon the matter

question whether Blais was a member in good standing, said:

"Upon a consideration of all the evidence in the case, we are of the opinion that the local union of which the deceased Blais was a member, considered him to be a member in good standing, at and before his death, and so treated him. * * *

In our opinion the local lodge of which Blais was a member waived the By-laws in regard to his failing to pay dues and waived the forfeiture or suspension upon any such failure to pay dues promptly. The evidence justifies such a conclusion of the jury and the court."

The court there relied upon Jones v. Knights of Honor, 236 Ill. 113, in holding, as it did, that the subordinate lodge or council is the agent of the supreme body and may waive forfeiture or suspension by reason of failure to pay assessments and dues promptly.

Numerous other cases are cited in plaintiff's brief, all to the effect that the courts will be extremely reluctant to withhold a member's right to a death benefit, and that supreme or subordinate councils may waive the provisions of its by-laws with reference to the payment of dues under circumstances similar to those in the case before us. (Rockford Ins. Co. v. Storig, 137 Ill. 646; U. S. Life Ins. Co. v. Ross, 159 Ill. 476; Love v. Modern Woodmen of America, 259 Ill. 102; Illinois Life Asso. v. Wells, 200 Ill. 445; Henry v. North American Union, 222 Ill. App. 279.

Laffey's arrearages were fully paid prior to his death and a working card issued to him, indicating that the lodge considered him a member in good standing. Under the decisions cited, we are of the opinion that the sections of the constitution and by-laws providing that he shall be debarred from receiving donations until three months after all arrearages are paid, were waived by the defendant and that his widow became entitled to the prescribed funeral donation upon Laffey's death.

question whether Hilda was a member in good standing, said:

"Upon a consideration of all the evidence in the case, we are of the opinion that the local union of which the deceased Hilda was a member, considered him to be a member in good standing, at and before his death, and so treated him."

In our opinion the local lodge of which Hilda was a member waived the by-laws in regard to his failing to pay dues and waived the forfeiture of suspension upon any such failure to pay dues promptly. The evidence justifies such a conclusion of the jury and the court."

The court there relied upon Jones v. Knights of Honor,

238 Ill. 112, in holding, as it did, that the subordinate lodge or council is the agent of the supreme body and may waive forfeiture or suspension by reason of failure to pay assessments and dues promptly.

Various other cases are cited in minority's brief, all to the effect that the courts will be extremely reluctant to withhold a member's right to a death benefit, and that supreme or subordinate councils may waive the provisions of the by-laws with reference to the payment of dues under circumstances similar to those in the case before us. (Rockford Ins. Co. v. Hertz, 133 Ill. 548; W. S. Life Ins. Co. v. Hertz, 133 Ill. 476; Jones v. Modern Woodmen of America, 229 Ill. 106; Illinois Life Ins. Co. v. Hertz, 200 Ill. 416; Henry v. North American Union, 272 Ill. App. 375.

Latter's attorneys were fully paid prior to his death and a working card issued to him, indicating that the lodge considered him a member in good standing. Under the decisions cited, we are of the opinion that the actions of the association and by-laws providing that he shall be deprived of dues resulting donations until three months after all assessments are paid, were waived by the defendant and that the wife became entitled to the prescribed funeral donation upon latter's death.

There being no other questions involved, we believe the judgment of the trial court was properly entered and the same will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

There being no other questions involved, we believe
the judgment of the trial court was properly entered and the
same will accordingly be affirmed.
AFFIRMED.

WILSON, P. J. AND HERBIE J. COVINGTON.

33985

CHARLES W. HELSEL, HARRY HOOD
and AMERICAN SURETY COMPANY OF
NEW YORK, a corporation,

Plaintiffs in Error,

v.

M. L. RAU,

Defendant in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

260 I.A. 615

Opinion filed Jan. 28, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

By this writ of error, Harry Hood, a surety for complainant on two certain injunction bonds filed in the case of Helsel v. Rau during the pendency thereof, first in the City Court of Chicago Heights, and thereafter in the Circuit Court of Cook County, seeks to reverse the final decree entered in said cause insofar as it awards damages to the defendant, M. L. Rau. The complainant, Charles W. Helsel and American Surety Company of New York, also surety on one of said bonds, who were summoned as co-plaintiffs in error, have entered their appearances herein, adopted the errors assigned by Harry Hood, as well as the points and arguments contained in his brief, and join in the request for the reversal of said decree. Defendant in error, M. L. Rau, has filed no brief herein.

So far as material to the question urged by counsel in their arguments, the case made by the briefs is substantially as follows: By written lease of October 1, 1923, complainant became the lessee of a storeroom in Chicago Heights, located in a building wherein defendant conducted a department store. The lease provided that complainant should carry on the business of a baker in the demised premises and pay to defendant as rent therefor a sum equal to 8% of the gross income from the sale of bakery goods. The lease contained mutual covenants respecting

33085

CHARLES W. HENSEL, HARRY HOOD
and AMERICAN BAKERY COMPANY OF
NEW YORK, a corporation,

Plaintiffs in Error,

v.

M. I. VAN

Defendant in Error.

COOK COUNTY.

CIRCUIT COURT

ERROR TO

Opinion filed Jan. 28, 1931

MR. JUSTICE FRANK delivered the opinion of the court.

By this writ of error, Harry Hood, a surety for complainant on two certain injunction bonds filed in the case of HENSEL v. VAN during the pendency thereof, first in the City Court of Chicago Heights, and thereafter in the Circuit Court of Cook County, seeks to reverse the final decree entered in said case insofar as it awards damages to the defendant, M. I. VAN. The complainant, Charles W. HENSEL and American Bakery Company of New York, also surety on one of said bonds, who were summoned as co-defendants in error, have entered their appearances hereto, adopted the errors assigned by Harry Hood, as well as the points and arguments contained in his brief, and join in the request for the reversal of said decree.

Defendant in error, M. I. VAN, has filed no brief herein.

So far as material to the question urged by counsel in their arguments, the case made by the briefs is substantially as follows: By written lease of October 1, 1923, complainant became the lessee of a storeroom in Chicago Heights, located in a building wherein defendant conducted a department store. The lease provided that complainant should carry on the business of a baker in the leased premises and pay to defendant as rent therefor a sum equal to 8% of the gross income from the sale of bakery goods. The lease contained several covenants respecting

the manner of determining complainant's income and the coordination of his bakery with other departments in defendant's store.

During January 1924 disputes arose between the parties, which for the most part related to the means to be used in ascertaining the rent payable by complainant to defendant under the terms of the written lease. As a result of these differences defendant on February 1, 1924, notified complainant, in writing, that he had elected to terminate the lease because of complainant's persistent violation of numerous covenants of the lease. Complainant disregarded the notice, and on February 15, 1924, defendant disconnected the electric power and light wires which supplied electricity for use in the bakery and also closed an entrance connecting the bakery with other departments in the store.

Complainant thereupon filed a bill of complaint in the City Court of Chicago Heights seeking to restrain the defendant from suing at law for possession of said demised premises and from in any way interfering with the complainant's possession thereof. The court entered an order for the issuance of an injunction, as prayed in the bill, and fixed complainant's bond in the sum of \$500. Complying with the provisions of the order, complainant filed his bond in the aforementioned sum with Harry Hood as surety, whereupon the injunction writ was issued and served upon the defendant.

Subsequently upon petition of defendant for a change of venue, the cause was transferred to the Circuit Court of Cook County, where, pursuant to an order of said court, the complainant filed a second bond with the American Surety Company of New York as surety.

The case was later brought to issue and referred to a Master in Chancery. During the hearing before the Master additional security in the form of a third injunction bond in

the manner of determining complainant's income and the coordination of his bakery with other departments in defendant's store. During January 1934 disputes arose between the parties, which for the most part related to the means to be used in ascertaining the rent payable by complainant to defendant under the terms of the written lease. As a result of these differences defendant on February 1, 1934, notified complainant, in writing, that he had elected to terminate the lease, because of complainant's persistent violation of numerous covenants of the lease. Complainant disregarded the notice, and on February 15, 1934, defendant disconnected the electric power and light wires which supplied electricity for use in the bakery and also closed an entrance connecting the bakery with other departments in the store.

Complainant thereupon filed a bill of complaint in the City Court of Chicago Heights seeking to restrain the defendant from suing at law for possession of said leased premises and from in any way interfering with the complainant's possession thereof. The court entered an order for the issuance of an injunction, as prayed in the bill, and fixed complainant's bond in the sum of \$500. Complying with the provisions of the order, complainant filed his bond in the aforementioned sum with Harry Reed as surety, whereupon the injunction was issued and served upon the defendant.

Subsequently upon petition of defendant for a change of venue, the case was transferred to the Circuit Court of Cook County, where, pursuant to an order of said court, the complainant filed a second bond with the American Surety Company of New York as surety.

The case was later brought to issue and referred to a Master in Chancery. During the hearing before the Master additional security in the form of a third injunction bond in

the sum of \$2,000 was ordered by the court and filed by complainant with Harry Hood as surety.

On July 17, 1925, a final decree was entered in said cause, dissolving the temporary injunction and re-referring the cause to the Master for an accounting between the parties. From this decree the complainant prosecuted an appeal to this court, which, by its order (Gen. No. 30760), 243 Ill. App. 607, reversed said final decree and remanded the cause to the Circuit Court with directions to dismiss the bill of complaint.

Several months later the mandate was filed in the Circuit Court, the cause reinstated, redocketed and assigned, an order entered substituting solicitors, and leave granted to defendant to file his suggestions of damages in the cause. Defendant thereupon filed his suggestions of damages, and thereafter the cause coming on for hearing, an order was entered by the chancellor reciting that the court "doth find that by reason of the wrongful suing out of the injunction by the complainant in this cause that defendant has sustained damages in the sum of \$6750, * * * and that the complainant's bill of complaint be and the same is hereby dismissed." Neither surety was represented at the hearing held by the court on defendant's suggestions of damages, nor did either of them have notice or knowledge of the same.

It is urged among other things that the court erred in rendering a decree assessing defendant's damages, since by complainant's appeal from the final decree of July 17, 1925, the jurisdiction of the Circuit Court therein was superseded and thereby lost and was not thereafter restored by mandate for any purpose other than that of dismissing the bill of complaint. The decisions of our courts are uniformly to the effect that a perfected appeal operates to stay further proceedings by the court rendering the judgment or decree appealed from, and this is true

the sum of \$5,000 was ordered by the court and filed by com-

plainant with Harry Reed as surety.

On July 14, 1935, a final decree was entered in said

cause, dissolving the temporary injunction and re-termining the cause to the master for an accounting between the parties. From this decree the complainant presented an appeal to this court, which, by its order (Gen. No. 30760), 243 Ill. App. 607, reversed said final decree and remanded the cause to the Circuit Court with directions to dismiss the bill of complaint.

Several months later the mandate was filed in the Circuit Court, the cause reinstated, reheard and assigned, an order entered substituting solicitors, and leave granted to defendant to file his suggestions of damages in the cause. Defendant thereupon filed his suggestions of damages, and there- after the cause coming on for hearing, an order was entered by the chancellor reciting that the court "doth find that by reason of the wrongful suing out of the injunction by the complainant in this cause that defendant has sustained damages in the sum of \$4750. * * * and that the complainant's bill of complaint be and the same is hereby dismissed." Neither surety was represented at the hearing held by the court on defendant's suggestions of damages, nor did either of them have notice or knowledge of the same.

It is urged among other things that the court erred in rendering a decree assessing defendant's damages, since by com- plainant's appeal from the final decree of July 14, 1935, the jurisdiction of the Circuit Court therein was suspended and thereby lost and was not thereafter restored by a mandate for any purpose other than that of dismissing the bill of complaint. The decisions of our courts are uniformly to the effect that perfected appeal operates to stay further proceedings by the court rendering the judgment or decree appealed from, and this is true

notwithstanding the attempted reservation of jurisdiction in the decree, as in the instant case. It was so held in People v. Pam, 276 Ill. 181, where the court said that the only exception to the foregoing rule arises in divorce cases, where by express authorization of the statute, the trial court may make further orders as to alimony after the appeal has been perfected.

The trial court having thus lost all jurisdiction by reason of the perfection of the appeal from the decree of July 17, 1925, its jurisdiction therein could not be restored except by the mandate of the Appellate Court, and then only for the purpose of giving effect to the directions of that court. The direction was to dismiss the bill of complaint, not to enter a decree for money damages. In approving this limitation upon the jurisdiction of the chancellor the Supreme Court in Fisher v. Burks, 285 Ill. 290, which is squarely in point, states the rule as follows:

"This court may, by express directions or by its determination of the merits of the case, limit the power of the chancellor, upon remandment, to the entry of a specific, proper and correct decree. In this case the mandate certified by the clerk gave specific directions to the trial court to dismiss the bill for want of equity. It was the duty of the chancellor to follow and obey the mandate. * * * On receipt of the mandate and opinion of this court the lower court was bound to carry into complete effect the decision of this court and not to re-try the cause or place defendants in error in a position by which the cause might be retried. The dismissal of the bill for want of equity was the only proper thing the lower court could do under the mandate before it."

We have considered the further errors assigned in respect to the various elements of damages constituting the total sum of \$6750, the lack of a certificate of evidence to support the assessment, and the failure of defendant to serve notice as a pre-requisite to the filing of the mandate, but

notwithstanding the attempted reservation of jurisdiction in the decree, as in the instant case. It was so held in People v. Lee, 278 Ill. 181, where the court said that the only exception to the foregoing rule arises in divorce cases, where by express authorization of the statute, the trial court may make further orders as to alimony after the appeal has been perfected.

The trial court having thus lost all jurisdiction by reason of the perfection of the appeal from the decree of July 17, 1925, its jurisdiction therein could not be restored except by the mandate of the appellate court, and then only for the purpose of giving effect to the directions of that court. The direction was to dismiss the bill of complaint, not to enter a decree for money damages. In approving this limitation upon the jurisdiction of the chancellor the supreme court in Robert v. Burke, 282 Ill. 280, which is squarely in point, states the rule as follows:

"This court may, by express directions or by its determination of the merits of the case, limit the power of the chancellor, upon remandment, to the entry of a specific, proper and correct decree. In this case the mandate certified by the clerk gave specific directions to the trial court to dismiss the bill for want of equity. It was the duty of the chancellor to follow and obey the mandate. " " " On receipt of the mandate and opinion of this court the lower court was bound to carry into complete effect the decision of this court and not to re-try the cause or discuss the merits in error in a position by which the cause might be reversed. The dismissal of the bill for want of equity was the only proper thing the lower court could do under the mandate before it."

We have considered the further errors assigned in respect to the various elements of damages constituting the total sum of \$8750, the lack of a certificate of evidence to support the assessment, and the failure of defendant to serve notice as a prerequisite to the filing of the mandate, but

in view of our conclusion upon the question of assessing damages under the limited mandate of this court to dismiss, we deem it unnecessary to discuss the other contentions of plaintiffs.

The decrees will, therefore, be reversed insofar as it assesses defendant's damages and the bill of complaint having heretofore been dismissed in accordance with the mandate of this court, it will be unnecessary to remand the cause for any further proceeding.

REVERSED.

WILSON, P.J. AND HEBEL, J. CONCUR.

in view of our conclusion upon the question of assessing damages under the limited mandate of this court to dismiss, we deem it unnecessary to discuss the other contentions of plaintiff.

The decree will, therefore, be reversed insofar as it assesses defendant's damages and the bill of complaint having heretofore been dismissed in accordance with the mandate of this court, it will be unnecessary to reamend the cause for any further proceeding.

REVEREND.

WILLIAM D. J. AND HENRY J. JOHNSON.

34042

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

v.

BENTON BAKER,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 615²

Opinion filed Jan. 28, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The defendant, Benton Baker, was tried upon an information filed in the Municipal Court of Chicago charging that on August 21, 1929, at the City of Chicago, he

"did then and there unlawfully operate a motor vehicle to-wit: an automobile on a public highway of the City of Chicago, County of Cook and State of Illinois, while drunk or intoxicated in violation of Sec. 41, Par. 242, of Chap. 131 Smith-Hurd R.S. 1927 contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois."

Trial by jury was waived and the court after hearing the evidence found the defendant guilty in manner and form as charged in the information, sentenced him to six months in the House of Correction, and imposed a fine of \$500. The defendant seeks by this writ of error to reverse the judgment of the trial court.

The facts disclosed by the testimony of several witnesses show that shortly past midnight on August 21, 1929, Thomas McDonald, while standing on a safety island located at the intersection of 59th Street and Western Avenue, waiting for a street car, was struck by an automobile going north on Western Avenue and severely injured.

Walter W. Adamski, a police officer, testified that while pulling a box on the corner where the accident occurred some one came to him and said, "a man just got hit on the safety

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

v.

BARTON BAKER,
Plaintiff in Error.

MUNICIPAL COURT

OF CHICAGO.

SEC. I. A. 615

Opinion filed Jan. 28, 1931

MR. JUSTICE WHELAN delivered the opinion of the court.

The defendant, Barton Baker, was tried upon an

information filed in the Municipal Court of Chicago charging

that on August 21, 1929, at the City of Chicago, he

"did then and there unlawfully operate a motor
vehicle to-wit: an automobile on a public highway
of the City of Chicago, County of Cook and State
of Illinois, while drunk or intoxicated in violation
of Sec. 41, Chap. 121, Smith-Howard P.S.
1927 contrary to the form of the Statute in such
case made and provided, and against the peace and
dignity of the people of the State of Illinois."

Trial by jury was waived and the court after hearing

the evidence found the defendant guilty in manner and form as
charged in the information, sentenced him to six months in the
House of Correction, and imposed a fine of \$500. The defendant
seeks by this writ of error to reverse the judgment of the
trial court.

The facts disclosed by the testimony of several
witnesses show that shortly past midnight on August 21, 1929,
Thomas McDermid, while standing on a safety island located at
the intersection of 25th Street and Western Avenue, waiting
for a street car, was struck by an automobile going north on
Western Avenue and severely injured.

Sgt. W. Adamski, a police officer, testified that
while pulling a box on the corner where the accident occurred
some one came to him and said, "a man just got hit on the safety

island and he got away"; that he saw a couple of fellows standing on the corner and requested them to "get that car, he just hit a fellow"; that they overtook the automobile at the signal light on Western Avenue and 55th street and "brought him back"; that when Adamski ordered defendant to step out of the car and arrested him, he started to stagger and did not seem to know what he was talking about; that his eyes appeared glazed and his breath smelled of liquor. Upon cross-examination the witness further stated that two other men were in the car with Baker, and in answer to a question propounded by the court said that defendant admitted he was driving the car.

Walter Monroe, another witness, testified that he was a sergeant of police in the City of Chicago on August 21, 1929, assigned to the station to which Baker was brought when arrested; that he had occasion to examine the defendant when he arrived at the station; that Baker was unsteady on his feet, had an impediment in his speech, was "bleary eyed" and smelled of liquor; that the witness had been on the police force 19 years during which he had examined many intoxicated persons and that in his opinion Baker was intoxicated and not in a fit condition to drive an automobile.

Baker in his own behalf testified to circumstances which took him out to 79th Street and Ashland Avenue on business the night of August 21, 1929; that he left there at about 11:30 P.M. and drove north on Western Avenue, and passed 59th Street without noticing any unusual occurrence; that when he reached 55th Street at the signal light, a special officer accosted him with the question, "did you know you hit a man at 59th and Western?", to which he replied "no, I didn't know it"; that he was told to turn around and drive back, which he did, and was

stand-
ing on the corner and requested them to "get that car, he just
hit a fellow"; that they overtook the automobile at the signal
light on Western Avenue and 53rd Street and "brought him back";
that when Adamski ordered defendant to step out of the car and
arrested him, he started to stagger and did not seem to know
what he was talking about; that his eyes appeared glazed and
his breath smelled of liquor. Upon cross-examination the
witness further stated that two other men were in the car with
Baker, and in answer to a question propounded by the court said
that defendant admitted he was driving the car.

Walter Monroe, another witness, testified that he was
a sergeant of police in the City of Chicago on August 31, 1932,
assigned to the station to which Baker was brought when arrested;
that he had occasion to examine the defendant when he arrived
at the station; that Baker was unsteady on his feet, had an
impediment in his speech, was "diarrhy eyed" and smelled of
liquor; that the witness had been on the police force 19 years
during which he had examined many intoxicated persons and that
in his opinion Baker was intoxicated and not in a fit condition
to drive an automobile.

Baker in his own behalf testified to circumstances
which took him out to 73rd Street and Oakland Avenue on business
the night of August 31, 1932; that he left there at about 11:30
P.M. and drove north on Western Avenue, and passed 53rd Street
without noticing any unusual occurrence; that when he reached
53rd Street at the signal light, a special officer accosted him
with the question, "did you know you hit a man at 53rd and
Western?", to which he replied "no, I didn't know it"; that he
was told to turn around and drive back, which he did, and was

arrested upon his return to 59th Street and Western Avenue. He admitted that he had been drinking but denied being intoxicated.

It is first urged that while the information is based on a violation of the statute which prohibits driving an automobile on a public highway while intoxicated, the actual trial was founded upon the accident and injuries sustained by McDonald, and that the state was allowed to introduce evidence of the accident which was immaterial to the issue and prejudicial to defendant. It is true that such evidence was admitted but a considerable portion thereof was elicited by defendant's counsel upon cross examination, and as to that he should not be heard to complain. Moreover, the trial was had before the court without a jury and we assume that the court considered only such evidence as was material to the charge contained in the information. The question, therefore, presented for decision is whether upon the whole record the evidence discloses that Baker violated the statute, (1) in driving an automobile, (2) on a public highway, (3) while drunk or intoxicated.

It appears from the evidence that Baker was driving the car. The record contains his admission that he had been drinking, and while there is a denial of his intoxication, two other competent witnesses testified to facts from which the court may well have found that he was intoxicated, and we are not disposed to disturb this finding. Upon the question whether it was necessary for the state to prove by direct evidence that the street in question constitutes a public highway, we regard the recent case of People v. Kyle, No. 33938, which was also tried in the Municipal Court, as controlling. It was there held that:

"As the streets of the City of Chicago are created by ordinances, it would therefore seem that irrespective of the proof, the court in which defendant was tried,

arrested upon his return to 38th Street and Western Avenue. He admitted that he had been drinking but denied being intoxicated. It is first urged that while the information is based on a violation of the statute which prohibits driving an auto-mobile on a public highway while intoxicated, the actual trial was founded upon the accident and injuries sustained by McDonald, and that the state was allowed to introduce evidence of the accident which was immaterial to the issue and prejudicial to defendant. It is true that such evidence was admitted but a considerable portion thereof was elicited by defendant's counsel upon cross-examination, and as to that he should not be heard to complain. Moreover, the trial was had before the court without a jury and it appears that the court considered only such evidence as was material to the charge contained in the information. The question, therefore, presented for decision is whether upon the whole record the evidence disclosed that Baker violated the statute, (1) in driving an automobile, (2) on a public highway, (3) while drunk or intoxicated. It appears from the evidence that Baker was driving the car. The record contains his admission that he had been drinking, and while there is a denial of his intoxication, two other competent witnesses testified to facts from which the court may well have found that he was intoxicated, and we are not disposed to disturb this finding. Upon the question whether it was necessary for the state to prove by direct evidence that the street in question constituted a public highway, we regard the recent case of People v. Ely, No. 35352, which was also tried in the Municipal Court, as controlling. It was there held that:

"As the streets of the City of Chicago are created by ordinance, it would therefore seem that legislative of the body, the court in which defendant was tried,

would have been required to take judicial notice that the places mentioned in the testimony were in a public highway."

Defendant further contends that the information was based on a violation of Section 41, Paragraph 242 of Chapter 121 of the Revised Statutes of 1927, which was repealed at the time of the violation, and that sentence was imposed under the Statute of 1929. Inasmuch as the information states a good cause of action without reference to any designation of the particular statute of which it was a violation, we regard this contention as being without merit.

The remaining ground urged for reversal is that the court should have appointed a competent attorney to represent defendant. It appears from the record that one Dolan appeared and cross examined witnesses on behalf of the defendant. No request was made for other counsel, nor is there anything of record to indicate that defendant desired an opportunity to secure other counsel or an appointment by the court. Two cases are relied upon by defendant in support of his contention, People v. Bopp, 279 Ill. 184, and People v. Schulman, 299 Ill. 125. The first of these cases holds that an attorney appointed to defend a person charged with crime should not be compelled by the court to act without being allowed a reasonable time in which to prepare the defense. This case is not applicable because it does not appear of record that Dolan was appointed by the court, nor that any request was made for a continuance for the purpose of preparing the defense. The second case cited holds that a poor defense by counsel will not justify a reversal of a judgment of conviction which is "reasonably supported by the evidence," but where the evidence is doubtful and the defendant was deprived of valuable impeachment evidence because his counsel was ignorant of the proper method

would have been required to take judicial notice that the places mentioned in the testimony were in a public highway."

Defendant further contends that the information was based on a violation of Section 41, Paragraph 222 of Chapter 121 of the Revised Statutes of 1937, which was repealed at the time of the violation, and that sentence was imposed under the Statute of 1930. Inasmuch as the information states a good cause of action without reference to any designation of the particular statute of which it was a violation, as regards this contention as being without merit.

The remaining ground urged for reversal is that the court should have appointed a competent attorney to represent defendant. It appears from the record that one John appeared and was examined by the court on behalf of the defendant. As request was made for other counsel, but it being impossible to report to indicate that defendant desired an opportunity to secure other counsel or an appointment by the court. Two cases are relied upon by defendant in support of his contention, Leone v. State, 875 Ill. 154, and People v. Robinson, 238 Ill. 122. The first of these cases holds that an attorney appointed to defend a person charged with crime should not be considered by the court to act without using allowed a reasonable time in which to prepare the defense. This case is not applicable because it does not speak of record that John was appointed by the court, nor that any request was made for a continuance for the purpose of procuring the defense. The second case cited holds that a poor defense by counsel will not justify a reversal of a judgment of conviction which is "manifestly supported by the evidence." But where the evidence is doubtful and the defendant was deprived of valuable independent evidence because his counsel was ignorant of the proper method

of laying the foundation for its introduction, the judgment will be reversed. The conviction in this case is amply supported by the evidence upon the precise questions of whether Baker was driving the car and whether he was intoxicated, and we find nothing in the manner in which Baker's defense was presented to indicate that evidence material to the defense was omitted or improperly presented to the court.

For the foregoing reasons we regard the judgment as having been properly entered, and the same will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

of laying the foundation for the introduction, the judgment will be reversed. The conviction in this case is amply supported by the evidence upon the precise question of whether Baker was driving the car and whether he was intoxicated, and we find nothing in the manner in which Baker's defense was presented to indicate that evidence material to the defense was omitted or improperly presented to the court. For the foregoing reasons we regard the judgment as having been properly entered, and the same will accordingly be affirmed.

AFFIRMED.

WILSON, R. J. AND REAGAN, J. CONCUR.

34083

E.H. ASHDOWN and G. R. WILLIAMS,
Trading as Ashdown Williams &
Company, a partnership,

Appellee,

v.

MAREK KRAUS,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

260 I.A. 615³

Opinion filed Jan. 28, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an action of trespass on the case on promises, commenced by the filing of a declaration, subsequently amended, consisting of common counts, supported by affidavit stating that plaintiffs' claim for \$1300 is for goods, wares and merchandise and for labor and services rendered and delivered to Marek Kraus and F. G. Mazurkiewicz at their special instance and request. Pleas to the amended declaration were filed by Kraus, the appellant, denying the promises alleged and that he ever contracted with plaintiffs for the rendering of services, and also denying the defendants' joint liability. The defendant, Kraus, by this appeal seeks to reverse the judgment of the Circuit Court entered upon the jury's verdict finding the issues for the plaintiffs and against the defendants and assessing the plaintiffs' damages at the sum of \$1300.

Briefly stated the facts disclose that plaintiffs are civil engineers with offices at Chicago Heights, Illinois; that the defendant Mazurkiewicz, a real estate subdivider, purchased a tract of land consisting of 160 acres from one Messner; that at the time of the purchase plaintiffs had made a partial survey of the acreage under a contract with Messner, upon which the latter had made a payment on account; that this contract was assumed by Mazurkiewicz when he purchased the 160 acres; that

T. R. ASHCROFT and O. R. WILLIAMS,
Plaintiffs,
vs.
Company, a Partnership.

CIRCUIT COURT

COOK COUNTY

HARVEY KRAMER,

Appellant.

3601A.615

Opinion filed Jan. 28, 1931

THE JUSTICE DELIVERED THE OPINION OF THE COURT.

THIS IS AN ACTION OF TREASON ON THE CASE ON

PROMISE, COMMANDED BY THE FILING OF A DECLARATION, SUBSEQUENTLY

AMENDED, CONTAINING ALLEGATIONS, SUPPORTED BY AFFIDAVITS

STATING THAT PLAINTIFFS' CLAIM FOR \$1000 IS FOR GOODS, WARES

AND MERCHANDISE AND FOR LABOR AND SERVICES RENDERED AND DELIVERED

TO HARVEY KRAMER AND T. R. ASHCROFT AT THEIR SPECIAL INSTANCES

AND REQUEST. THESE IN THE AMENDED DECLARATION WERE FILED BY

KRAMER, THE DEFENDANT, DENYING THE PROMISE ALLEGED AND THAT HE

EVER CONTRACTED WITH PLAINTIFFS FOR THE RENDERING OF SERVICES,

AND ALSO DENYING THE DEFENDANT'S JOINT LIABILITY. THE DEFENDANT,

KRAMER, BY THIS APPEAL SEEMS TO REQUEST THE JUDGMENT OF THE

CIRCUIT COURT ENTERED UPON THE JURY'S VERDICT FINDING THE DEFENDANT

FOR THE PLAINTIFFS AND AGAINST THE DEFENDANT AND ASSESSING THE

PLAINTIFFS' DAMAGES AT THE SUM OF \$1000.

BRIEFLY STATED THE FACTS DISCLOSE THAT PLAINTIFFS ARE

CIVIL ENGINEERS WITH OFFICES AT CHICAGO HEIGHTS, ILLINOIS; THAT

THE DEFENDANT ASHCROFT, A REAL ESTATE SUBDIVIDER, PURCHASED

A TRACT OF LAND CONSISTING OF 160 ACRES FROM ONE KRAMER; THAT

AT THE TIME OF THE PURCHASE PLAINTIFFS HAD MADE A CERTICAL SURVEY

OF THE TRACT UNDER A CONTRACT WITH KRAMER, UPON WHICH THE

DEFENDANT HAD MADE A PAYMENT ON ACCOUNT; THAT THIS CONTRACT WAS

SIGNED BY ASHCROFT WHEN HE PURCHASED THE 160 ACRES; THAT

Nichols, the broker who sold the land to Mazurkiewicz, brought the latter and plaintiffs together in his office where they agreed upon certain changes to be made in the survey and the price of \$1800 for completing the work, all of which was confirmed by plaintiffs' letter to Mazurkiewicz; that the defendant, Kraus, had loaned Mazurkiewicz \$30,000 with which to purchase the land in question upon the condition that as the lots were sold the contracts of sale should be deposited with Kraus, who was to make collections and apply the payments on the loan; that when plaintiffs' plat of the survey was completed and approved they forwarded it to Mazurkiewicz with a bill for \$500 on account, which was paid by Kraus, leaving the balance of \$1300.

Plaintiffs' suit is founded upon an express contract for services contained in their letter to Mazurkiewicz, which is as follows:

"Mr. Frank J. Mazurkiewicz,
8601 Belmont Ave.,
Chicago, Illinois.

Dear Sir:

In accordance with our conversation in Mr. Nichols office on June 18, 1926, we herewith submit the following prices and methods of payment for making subdivision plat and having same approved by the Village Board of Orland Park, Illinois, and staking all lots with iron pegs. Said Subdivision to be known as 'Marek Kraus Orland Park Subdivision.'

For the above work we are to receive a total of \$1800.00 to be paid as follows, \$500.00 to be due and payable when plat is approved by the Village Board of Orland Park, Illinois; \$500.00 to be due and payable when subdivision is one half staked; \$800.00 to be due and payable when staking of subdivision is completed.

Yours very truly,
Ashdown, Williams & Company,
By E. H. Ashdown."

There is no contention, of course, that the defendant Kraus, who was in no way privy to this agreement could be liable thereunder but it is urged that by reason of ^{his} accepting the benefits of the services rendered in surveying property in which he was interested, he became liable on an implied contract. Upon

Nichols, the broker who sold the land to Krumm, brought the latter and plaintiff together in his office where they agreed upon certain changes to be made in the survey and the price of \$1500 for completing the work, all of which was confirmed by plaintiff's letter to Krumm; that the defendant, Krumm, had loaned Krumm \$10,000 with which to purchase the land in question upon the condition that as the lots were sold the proceeds of sale should be deposited with Krumm, who was to make collections and apply the payments on the loan; that when plaintiff's part of the survey was completed and approved they forwarded it to Krumm with a bill for \$500 on account, which was paid by Krumm, leaving the balance of \$1500. Plaintiff's suit is founded upon an express contract for services contained in their letter to Krumm, which

is as follows:

"Mr. Frank J. Krumm,
5501 Belmont Ave.,
Chicago, Illinois.

Dear Sir:

In accordance with our conversation in Mr. Nichols' office on June 15, 1938, we herewith submit the following prices and methods of payment for making subdivision plat and having same approved by the Village Board of Grand Park, Illinois, and stating all lots with their page. Said subdivision to be known as 'Grand Park Grand Park Subdivision'.

For the above work we are to receive a total of \$1500.00 to be paid as follows: \$500.00 to be due and payable when plat is approved by the Village Board of Grand Park, Illinois; \$500.00 to be due and payable when subdivision is one half stated; \$500.00 to be due and payable when statement of subdivision is completed.

Yours very truly,
Anderson, Williams & Company,
Atty. E. N. Anderson."

There is no contention, of course, that the defendant Krumm, who was in no way privy to this agreement could be liable thereunder but it is urged that by reason of recording the benefits of the services rendered in surveying property in which he was interested, he became liable on an implied contract. When

this theory he was joined in the suit as defendant and found jointly liable with the contract obligor, Mazurkiewicz, Plaintiffs base Kraus' implied liability upon his conduct in accepting the benefits of the survey, making the initial payment of \$500 on account of the services rendered under the express agreement, corresponding with plaintiffs in reference to the survey, and the payment thereof, and upon his failure to deny liability after receiving statements from plaintiffs for the balance due under the agreement. The admissibility of some or all of the evidence bearing upon these facts is problematical, but need not here be considered for the reason that the motion of defendant Kraus, overruled by the court, to direct a verdict in his favor on the ground that no implied contract existed as to him, raised a question of law which the court should have resolved in favor of Kraus. The immediate question upon which this motion was founded and the one first presented for decision by this appeal is whether there could be an implied contract as to Kraus in view of the express agreement existing between plaintiffs and Mazurkiewicz for the identical services. The decisions in this state are generally to the effect that there can not.

In the early case of Walker v. Brown, 28 Ill. 378, which is cited all through the later decisions, the court said:

"The error in this whole proceeding arises upon the assumption, that the plaintiff in error might become liable under the implication of law, that he should pay the reasonable worth of services, beneficial to him, bestowed upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person."

The same rule was laid down in Schmal v. Edgeworth, 118 Ill. App. 332. There a written contract was entered into between Edgeworth and Augustine J. Schmal for the construction of a stone front to a building owned by Katherine Schmal, who was not a party to the contract. The defendants, as here, filed

this theory he was joined in the suit as defendant and found jointly liable with the contract obligor, defendant, Plaintiff. This case shows, implied liability upon his conduct in accepting the benefits of the survey, making the initial payment of \$200 as a receipt of the services rendered under the express agreement, corresponding with plaintiff's in relation to the survey, and the payment thereof, and upon his failure to deny liability after receiving statements from plaintiff for the balance due under the agreement. The admissibility of some or all of the evidence bearing upon these facts is problematical, but need not here be considered for the reason that the notion of defendant's, overruled by the court, to direct a verdict in his favor on the ground that no implied contract existed as to him, raised a question of law which the court should have resolved in favor of Kraus. The immediate question upon which this action was founded and the one first presented for decision by this appeal is whether there could be an implied contract as to Kraus in view of the express agreement existing between plaintiff and defendant for the identical services. The decision in this state are generally to the effect that there was not.

In the early case of Walker v. Brown, 38 Ill. 378, which is cited all through the later decisions, the court said:

"The error in this whole proceeding arises upon the assumption, that the plaintiff in error might be considered liable under the obligation of law, that he should pay the reasonable worth of services, beneficial to him, rendered upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person."

The same rule was laid down in Bohml v. Bohmler, 118 Ill. App. 332. There a written contract was entered into between Edgeworth and Augustine J. Bohml for the construction of a stone front to a building owned by Katherine Bohml, who was not a party to the contract. The defendants, as here, filed

verified pleas denying joint liability, and the court in its opinion said:

"There was an express contract between Augustine J. Schiml and the plaintiff for the work in question at an agreed price and no contract between the plaintiff on the one part and Augustine J. and Katherine Schiml on the other part could therefore be implied. 'An implied contract cannot arise when there is a subsisting express contract covering the entire subject-matter.' Ford v. McVay, 55 Ill. 119-123."

It is obvious, of course, that in the foregoing case Katherine Schiml was the principal beneficiary of the services rendered under the contract, but notwithstanding that fact the effect of the decision is that she could not be liable upon an implied contract where an express agreement existed.

In Poley, Admr. v. Bushway, 71 Ill. 386, Lucy Wright, the widow of an intestate, made a contract in writing with Bushway for the erection of a monument over the grave of her husband, "said money to be paid from the estate of said Erastus Wright, deceased". Suit was brought against the administrator. The facts disclosed that the administrator had seen the contract the day after it was made, knew of the provision for payment out of the estate funds and did not object thereto, but on the contrary "seemed to be pleased" about the plan. In commenting on these circumstances the court said:

"So long as the estate he represented was not bound by any act, to pay for it, he had no cause to object; and how, as a friend to the deceased, could he be otherwise than pleased, that his widow, in the fullness of her devotion to the remains of her deceased husband, had determined to erect a monument over them of 'American Italian marble?' Of what avail would be an objection by the administrator? The contract was made without consulting him, and it is a valid contract as to the parties to it."

This decision is likewise to the effect that the existence of an express contract between the widow and Bushway precluded liability under an implied contract with the administrator,

verified places denying joint liability, and the court in 1902

opinion said:

"There was an express contract between respondent and the plaintiff for the work in question at an agreed price and no contract between the plaintiff and the defendant. It is not to be inferred from the fact that the plaintiff on the other hand could not recover on the implied contract unless there is a contract covering the entire work; see Matter v. Mory, 55 Ill. 115-122."

It is obvious, of course, that in the foregoing case the plaintiff was the principal beneficiary of the services rendered under the contract, but notwithstanding that fact the effect of the decision is that she could not be liable upon an implied contract where an express agreement existed.

In Potter v. Potter, 111 Ill. 388, 100 Ky. 181, the widow of an intestate, who was living with her husband for the purpose of a monument over the grave of her husband, "said money to be paid from the estate of said husband, deceased". Suit was brought against the administrator. The facts disclosed that the administrator had seen the contract the day after it was made, knew of the provision for payment out of the estate funds and did not object thereto, but on the contrary "seemed to be pleased" about the plan. In concluding on these circumstances the court said:

"So long as the estate he represented was not bound by any act, he was not bound to object; and how, as a friend to the deceased, could he be otherwise than pleased, that his wife in the fulness of her devotion to the memory of her deceased husband, had determined to erect a monument over that of 'Auntie's' mother? Of what avail would be an objection by the administrator? The contract was made without consulting him, and it is a valid contract as to the parties to it."

This decision is likewise to the effect that the existence of an express contract between the widow and husband precluded liability under an implied contract with the administrator.

notwithstanding the administrator's knowledge of an express provision in the agreement that the monument was to be paid for by funds of the estate.

In the case of Sullivan v. Detroit Y. & A.A.R. Co., reported in 135 Mich. 661; 64 L. R. A. 673, plaintiff relied on an implied contract, notwithstanding the existence of an express agreement and the court in its opinion, citing among other cases Walker v. Brown, 28 Ill. 378, supra, said:

"A contract will be implied only when no express contract exists. If A makes an express contract with B to perform services for C, C is not liable on an implied contract because he received the benefit. The two contracts cannot exist together, governing the same transaction. 'As in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law interposes and raises a promise.' Walker v. Brown, 28 Ill. 378, 81 Am. Dec. 287. So,, plaintiff could not have an express contract with these three promoters that they, in consideration for his services in assisting to successfully accomplish the scheme, would make him the permanent attorney of the company, and at the same time have an implied contract with the company to pay him for the same services. Lyndon Mill Co. v. Lyndon Literary & Biblical Inst. 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; Royston v. McCulley, (Tenn. Ch.App.) 52 L. R. A. 899, 53 S. W. 725; Thorp v. Bateman, 37 Mich. 68, 26 Am. Rep. 497; Boughton v. Boughton, 111 Mich. 27, 69 N. W. 94."

Other Illinois decisions are to the same effect, (Ballard v. Shea, 121 Ill. App. 136; Ford v. McVay, 55 Ill. 119, Siegel v. Borland, 191 Ill. 107; Illingsworth v. Slosson, 19 Ill. App. 613), and no cases to the contrary are cited in plaintiffs' brief.

We are therefore of the opinion that plaintiffs' evidence taken in the light most favorable to them, with all reasonable intendments and inferences, could not, as a matter of law, constitute an implied contract for the reason that an express contract covering the entire subject matter, upon which plaintiffs were clearly entitled to recover as to Mazurkiewicz,

other cases Allex v. Gray, 33 Ill. 375, 376, said:

express agreement and the court in its opinion, stating among
 on an implied contract, notwithstanding the existence of an
 reported in 133 Mich. 381; 64 L. E. A. 375, 376, plaintiff relied

In the case of Smith v. Detroit & A. A. R. Co.,

"A contract will be implied only when no express contract exists. If A makes an express contract with B to perform services for C, C is not liable on an implied contract because he received the benefit. The two contracts cannot exist together. Governing the same transaction, as in Hynes, two valid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law intervenes and raises a presumption." Milner v. Brown, 98 Ill. 278, 61 Am. Dec. 887, 90; Plaintiff could not have an express contract with these three promoters that they, in connection for his services in assisting him the business-fully accomplished the venture, would make him the partner and attorney at the company, and at the same time have an implied contract with the company to pay him for the same services. Lynch v. Co., 7 Lyndon, 117; Arling v. Elliott, 120 N.Y. 251, 22 Am. Rep. 465, 93 Ill. 278; Rosson v. Schuler, (Tenn. Ch. App.) 37 S.W. 2d 100; Wright v. Henson, 37 Mich. 68, 23 Am. Rep. 457; Houghton v. Houghton, 111 Mich. 27, 28 N.E. 94."

Other Illinois decisions are to the same effect.
(Ballard v. Board, 121 Ill. App. 155; Ford v. Board, 52 Ill. 116;
Steele v. Board, 121 Ill. 107; Illinois v. Board, 10 Ill.
App. 513), and no cases to the contrary are cited in plaintiff's
brief.
We are therefore of the opinion that plaintiff's
evidence taken in the light most favorable to them, with all
reasonable inferences and inferences, could not, as a matter of
law, constitute an implied contract for the reason that an
express contract covering the entire subject matter, upon which
plaintiff were clearly entitled to recover as to "unpublished

subsisted. Plaintiffs' case against Mazurkiewicz was clear and undisputed, but no liability was shown as to Kraus. Under Section 54 of our Practice Act and the decisions of our courts construing the same, where joint liability is alleged and denied by verified pleas, plaintiff, in order to recover, must prove a case against all the defendants or else he must dismiss as to those whom he cannot prove liable and amend his declaration by striking out so much thereof as charges that the dismissed party was liable. This is in conformity with the rule that the proof must follow the pleadings. (Powell v. Finn, 198 Ill. 587; Leisteks v. Smith, 190 Ill. App. 313; Griffith v. Furry, 30 Ill. 251). This plaintiffs failed to do and accordingly the court should have directed a verdict against plaintiffs at the close of all the evidence.

Defendant states in his brief that during the progress of the trial the court asked questions or made comments and remarks more than 200 times, and contends that some of these occurrences were highly prejudicial and tended to impress the jury with the idea that the court did not believe the testimony of defendants. An instance of the procedure complained of appears during the examination of the defendant Mazurkiewicz, who testified that he did not remember whether he had dictated plaintiffs' exhibits 7 and 8. The court took up the examination of the witness for more than four pages of the record, asked the same question, whether he had dictated the letter, five different times, and when defendant's counsel objected to this line of examination, indicating that he considered it unfair, the court remarked:

"Would you like to tell him what he did, you are trying to now?"

admitted. Plaintiff's case against defendant was clear and undisputed, but no liability was shown as to Kline. Under Section 34 of our practice act and the decisions of our courts concerning the same, where joint liability is alleged and denied by verified pleas, plaintiff, in order to recover, must prove a case against all the defendants or else he must disprove as to those whom he cannot prove liable and amend his declaration by striking out as much thereof as charges that the dismissed party was liable. This is in conformity with the rule that the party must follow the pleadings. (Powell v. Ryan, 108 Ill. 587; Leibert v. Smith, 100 Ill. App. 318; Smith v. Smith, 30 Ill. 521). This plaintiff failed to do and accordingly if the court should have directed a verdict against plaintiff at the close of all the evidence.

Defendant states in his brief that during the progress of the trial the court asked questions of each witness and received more than 200 lines, and contends that some of these occurrences were highly prejudicial and tended to impress the jury with the idea that the court did not believe the testimony of defendant. An instance of the procedure complained of appears during the examination of the defendant's handwriting, who testified that he did not remember whether he had dictated plaintiff's exhibits 1 and 2. The court took up the examination of the witness for now. Then your pages of the record, asked the same question, whether he had dictated the letter, five different times, and when defendant's counsel objected to this line of examination, indicating that he considered it unfair, the court remarked:

"Would you like to tell him what he did, you are trying to now?"

At the close of the examination this question was put to the witness by the court:

"Then you do not know whether you are telling a falsehood or the truth?"

While the defendant Kraus was on the witness stand plaintiffs' counsel showed him a letter and asked if he had ever seen it before, to which he replied:

"I did not, I did not dictate that letter, I did not know what was in that letter before today, I never saw it before."

The court then took up the cross-examination and the following is part of what ensued:

"The Court: You still say you didn't dictate it?

A. I did not.

The Court: What?

The Witness: I did not your Honor.

The Court: You had disposed of your interest hadn't you, in this property to Mr. Frank Mazurkiewicz. You have disposed of your interest to him, have you not?

A. Under a trust agreement.

The Court: I didn't ask you under what you have disposed of it. A. I did - - -

The Court: Is there any reason why you shouldn't answer these questions?

The Witness: No, there is not.

The Court: Then why don't you do it.

* * * * *

The Court: Yes, when you dictated these letters to your stenographer, was she authorized to use that stamp?"

In view of the witness' positive statement that he did not dictate the letter, the assumption of the court that he did and the entire character of the court's examination undoubtedly tended to discredit the witness before the jury.

Upon direct examination of Ashdown, one of the plaintiffs, an objection was made to plaintiffs' exhibit 4, a letter bearing a rubber stamp signature, whereupon the court interjected the following remark, "His testimony is that it came through the mail, the United States mail, in the regular way. It has all the earmarks of Kraus Bond and Mortgage Organization. The objection will be overruled."

will be overruled."

Assuming the letter was admissible, it was for the jury to pass upon its authenticity and the remark of the court was clearly improper.

There are numerous other instances in the record where the court examined and cross-examined witnesses at great length. Upon the direct examination of Kraus some 50 questions were asked and answered. The court either propounded questions or interrupted with comments and explanations. upwards of 30 times. The cross-examination was largely conducted by the court without the aid of counsel. Of the 50 or 60 questions put to the witness, the record shows approximately 40 instances in which the court either propounded the questions or interjected remarks and explanations. Some of the questions were improper and the effect of the court's attitude as shown by the record, undoubtedly left a strong suspicion with the jury as to the court's opinion of the defendant's veracity. While it is proper for the court to ask questions in the course of the trial, which may tend to explain to the jury matters not covered by the examination of counsel, the court should not interrupt unnecessarily or by its attitude display a bias or indicate what its opinion may be in the presence of the jury. The courts in this state have often stated this to be the rule, but no where more pointedly than in the case of Kane v. Kinnare, 69 Ill. App. 81, where Judge Gary under like circumstances said:

"Now the effect of the interruptions by the court on cross-examination of the appellant, was to discredit her before the jury * * *

The appellant is entitled to a trial at which her testimony shall be impartially considered by the jury.

One of the greatest difficulties of a nisi prius judge is to keep his mouth shut. I had twenty-five years experience of it. Skelly v. Boland, 78 Ill. 438; Chicago and Eastern R. R. v. Holland, 122 Ill. 461."

Assuming the letter was admissible, it was for the jury to pass upon its authenticity and the remark of the court was clearly improper.

There are numerous other instances in the record where

the court examined and cross-examined witnesses at great length. Upon the direct examination of Evans some 30 questions were asked and answered. The court either propounded questions

or interrupted with comments and explanations. Whereby of 30 times. The cross-examination was largely conducted by the court without the aid of counsel. Of the 30 or 35 questions put to the witness, the record shows approximately 40 instances in which the court either propounded the questions or interrupted remarks and explanations. Some of the questions were

improper and the effect of the court's attitude as shown by the record, undoubtedly left a strong suspicion with the jury as to the court's opinion of the defendant's veracity. While it is proper for the court to ask questions in the course of the trial, which may tend to explain to the jury matters not covered by the examination of counsel, the court should not interrupt unnecessarily or by its attitude display a bias or indicate what its opinion may be in the presence of the jury. The courts in this state have often stated this to be the rule, but no words were pointedly than in the case of State v. Kinnear, 63 Ill. App. 81, where Judge May under like circumstances said:

"Now the effect of the interruptions by the court on cross-examination of the defendant, was to discredit her before the jury." "The appellant is entitled to a trial at which her testimony shall be impartially considered by the jury. One of the greatest difficulties of a trial judge is to keep his mouth shut. I had twenty-five years experience of it. Shelly v. Boland, 72 Ill. 428; Chicago and Eastern O. R. v. Holland, 181 Ill. 401."

While it is true that counsel for defendant failed to object to the court's questions and remarks, except in a few instances, thereby precluding the defendant from raising the point, we regard the procedure too extraordinary to be overlooked.

We are in accord with plaintiffs' contention that this court cannot consider the weight or sufficiency of the evidence because of defendant's failure to include in his bill of exceptions a motion for a new trial and the court's ruling thereon, but in view of our conclusion that the express agreement precluded recovery on an implied contract, further consideration of the evidence becomes unnecessary. Errors of law may be reviewed notwithstanding the failure of the bill of exceptions to show a motion for a new trial and the rulings of the court on the motions to direct a verdict and for separate verdicts, appearing in the bill of exceptions, constitute errors of law. (Yarber v. C. & A., 235 Ill. 482, and cases cited therein.)

For the foregoing reasons the judgment of the Circuit Court will be reversed.

REVERSED.

WILSON, P.J. AND HEBEL, J. CONCUR.

While it is true that counsel for defendant failed to object to the court's questions and remarks, except in a few instances, thereby precluding the defendant from raising the point, we regard the procedure as extraordinary to be over-looked.

We are in accord with plaintiff's contention that this court cannot consider the weight or sufficiency of the evidence because of defendant's failure to include in his bill of exceptions a motion for a new trial at the court's ruling thereon, but in view of our conclusion that the express agreement precluded recovery on an implied contract, further consideration of the evidence becomes unnecessary. Error of law may be reviewed notwithstanding the failure of the bill of exceptions to show a motion for a new trial and the rulings of the court on the motion to direct a verdict and for separate verdicts, appearing in the bill of exceptions, constitute errors of law. (Yarber v. E. & A. 238 Ill. 483, and cases cited therein.)

For the foregoing reasons the judgment of the circuit Court will be reversed.

REVEREND.

WILSON, J., and SEBEL, J. CONCUR.

34072

ELIAS FISCHENHEIMER,

Appellant,

vs.

WILHELMINA MATTHIES GOMRING,

Appellee.

Appeal from

Municipal Court

of Chicago.

260 I.A. 615⁴

Opinion filed Jan. 28, 1931

MR. JUSTICE FRIMM delivered the opinion of the Court.

This action was commenced by the confession of a judgment in the Municipal Court of Chicago for \$1100 on a written indenture of lease. \$1000 was for rent for the months of February and March, 1929, at \$500 per month, and \$100 was allowed as attorney's fees. The lease was dated November 6, 1922, and was entered into by plaintiff and defendant for premises at 10-12 West Chestnut Street, Chicago, for the term ending April 30, 1933. It contained a provision that the lessee would not sub-let or assign the lease without the written consent of the owner.

Defendant subsequently filed a petition asking that the judgment be vacated. The usual order was entered allowing the petition to stand as an affidavit of merits, the case was tried by a jury, verdict rendered against plaintiff, the judgment by confession vacated and a judgment rendered against plaintiff for costs. By this appeal plaintiff seeks to reverse that judgment.

The defendant sets forth in the petition that at the time the lease was entered into defendant purchased from plaintiff the premises described in the lease and the contents thereof as a rooming house; that the purchase was made on behalf of John Matthies, husband of defendant who was in the hospital at the time; that she signed the lease, chattel mortgage and notes in her husband's behalf; that plaintiff promised to release her when her husband took

ELIAS STEINBERG

Appellant

vs.

WILLIAM MATTING COMPANY

Appellee

Municipal Court

of Chicago

Appeal from

360 I.A. 615

Opinion filed Jan. 28, 1931

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

This action was commenced by the confession of a

judgment in the Municipal Court of Chicago for \$100 as a

written instrument of lease. \$100 was for rent for two months

of February and March, 1930, at \$500 per month, and \$100 was

allowed as attorney's fees. The lease was dated November 6,

1929, and was entered into by plaintiff and defendant for premises

at 10-12 West Chestnut Street, Chicago, for the term ending April

30, 1930. It contained a provision that the lease would not

exist or assign the lease without the written consent of the

owner.

Defendant subsequently filed a petition asking that the

judgment be vacated. The usual order was entered allowing the peti-

tion to stand as an affidavit of merit. The case was tried by a

jury, verdict rendered in favor of plaintiff, the judgment by confession

vacated and a judgment rendered against plaintiff for costs. By

this appeal plaintiff seeks to reverse that judgment.

The defendant sets forth in the petition that at the

time the lease was entered into plaintiff was released from plaintiff

the premises described in the lease and the contract entered as

a rooming house; that the premises were made up of four

bedrooms, husband of defendant who was in the hospital at the time;

that she signed the lease, stated written and oral in her husband's

behalf; that plaintiff intended to release her husband from

possession but failed to do so, and also refused to accept her husband as plaintiff's tenant in place of defendant; that John Matthies, and not the defendant, had sole possession of the rooming house and paid all the rents and the chattel mortgage notes; that while defendant obtained no release in writing, nevertheless she assumed she had been released until steps were taken in April, 1929, by notice in writing served upon Matthies, demanding payment of rent and the termination of the lease.

The sole question presented for decision is whether there was an oral agreement by plaintiff to release the defendant from her obligation upon the written instrument and a consent to the substitution of defendant's husband as sole obligor. We have carefully read the testimony of the various witnesses as it appears in the abstract of record, including that of plaintiff, defendant and John Matthies. Summarized and taken in the light most favorable to defendant, it discloses nothing more than a conditional promise to release her. It is true that there were conversations between the parties with reference to the release of defendant, but the representations made by plaintiff were conditional upon further consideration of the matter by him with his attorney, and they never progressed sufficiently to become legally effective. We believe the parol agreement testified to by defendant falls short of proving that the lessor agreed to accept Matthies as his sole tenant. The payment of rent by plaintiff to defendant for quarters occupied by him in the demised premises, the retention of the lease by defendant after the parol agreement is alleged to have been made, and her subsequent requests of plaintiff to execute a written consent of the assignment sustain this conclusion. We are convinced from the evidence that defendant herself did not consider the assignment as having been consummated.

possession but failed to do so, and also refused to accept her husband as plaintiff's tenant in place of defendant; that John Matthews, and not the defendant, had sole possession of the rooming house and paid all the rents and the related mortgage notes; that while defendant obtained no release in writing, nevertheless she assumed she had been released until steps were taken in April, 1933, by notice in writing served upon Matthews, demanding payment of rent and the termination of the lease.

The sole question presented for decision is whether there was an oral agreement by plaintiff to release the defendant from her obligation upon the written instrument and a consent to the substitution of defendant's husband as sole obligor. To have carefully read the testimony of the various witnesses as it appears in the abstract of record, including that of plaintiff, defendant and John Matthews, submitted and taken in the light most favorable to defendant, it discloses nothing more than a conditional promise to release her. It is true that there were conversations between the parties with reference to the release of defendant, but the representations made by plaintiff were conditional upon further consideration of the matter by his wife's attorney, and they never progressed satisfactorily to become finally effective. We believe the parol agreement failed to be defendant's sole source of promise that the latter agreed to accept Matthews as sole tenant. The payment of rent by plaintiff to defendant for quarters occupied by him in the desired premises, the retention of the lease by defendant after the parol agreement is alleged to have been made, and her subsequent requests of plaintiff to execute a written consent to the assignment maintain this conclusion. We are convinced from the evidence that defendant herself did not consider the assignment as having been consummated.

The rule is well settled that the contract of the lessee continues in force notwithstanding she may have parted with her interest in the estate, unless the lessor enters into stipulations with the assignee to accept him as his sole tenant and absolve the original lessee, and the evidence must disclose a clear intent to make a new contract. Hoarst v. Mahne, 91 Ill. App. 314; Grosses v. St. Paul Trust Co., 147 Ill. 334. No such intention is shown in this case. On the contrary the evidence indicates that plaintiff never actually agreed to a substitution of tenants but in fact expressly refused to do so when requested to evidence his consent in writing.

Thompson v. Western Casket Co., 219 Ill. App. 164, is similar to the case before us. There likewise was a contention that a parol agreement for surrender of the premises with the lessor's consent was made. The court held that the lessee "was in privity with lessor in two ways, first, by privity of estate and, secondly, by privity of contract", and that although the assignment of the lease and the transfer of possession to a second party would destroy privity of estate, it would not destroy privity of contract, and the original lessee would still be liable on the written covenant to pay rent unless there was an express and clear intention to release the obligation.

Upon this state of facts we believe the trial court should have found that defendant's testimony did not constitute a defense at law and accordingly should have directed a verdict in favor of the plaintiff.

Appellee contends that the abstract of record fails to show that all of the evidence is contained therein and that it does not appear that plaintiff's motion for a directed verdict was

made at the close of all the evidence. If any of the evidence was not abstracted by appellant, it was the privilege of appellee to present the missing testimony to this court by an additional or supplemental abstract of record. This was not done and we therefore presume that the abstract of record contains all the evidence necessary to a proper consideration of the case. Plaintiff's motion for a directed verdict appears at the close of all the evidence. This was overruled by the court and exception taken thereto. We regard the motion as sufficiently shown by the abstract. Plaintiff was entitled to a finding and judgment in his favor for the amount of the unpaid rent, together with his attorney's fees as represented by the original judgment. The judgment of the trial court will therefore be reversed with a finding of facts and judgment entered here.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT ENTERED HERE.

Wilson, P.J., and Heber, J., concur.

FINDING OF FACTS.

We find that there was no agreement, express or implied, between plaintiff and defendant or John Matthies, whereby defendant was in any way released from her obligation to pay rent according to the covenant of the lease sued on, and that there remains due and unpaid under the terms of said lease for the months of February and March, 1929, the sum of \$1000, together with \$100 allowed as attorney's fees, and that the amount due and unpaid is \$1100.

made at the close of all the evidence. If any of the evidence was not admitted by appellant, it was the privilege of appellee to present the missing testimony to this court by an additional or supplemental abstract of record. This was not done and we therefore presume that the abstract of record contains all the evidence necessary to a proper consideration of the case. Plaintiff's motion for a directed verdict appears at the close of all the evidence. This was overruled by the court and exception taken thereto. The record shows the motion as satisfactorily shown by the abstract. Plaintiff was entitled to a finding and judgment in his favor for the amount of the unpaid rent, together with his attorney's fees as represented by the original judgment. The judgment of the trial court will therefore be reversed with a finding of facts and judgment entered there.

REVEREND JOHN L. WILSON, JUDGE OF THE
COURT OF THE DISTRICT OF COLUMBIA

Wilson, J. L., and Weber, J. L., Judges.

WILSON vs. WILSON

We find that there was no agreement, express or implied, between plaintiff and defendant or John Wilson, whereby defendant was in any way released from her obligation to pay rent according to the covenant of the lease and on, and that there remains due and unpaid under the terms of said lease for the months of February and March, 1932, the sum of \$1000, together with \$100 allowed an attorney's fees, and that the amount due and unpaid is \$1100.

34004

MARTIN MARCISZ,

Appellee,

v.

ANTONIO VITALE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 616

Opinion filed Jan. 28, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is a tort action by the plaintiff against the defendant in the Municipal Court of Chicago to recover money expended for medical services rendered to his minor son who was injured on April 3, 1926, while exercising due care and caution for his own safety, by a car controlled and negligently operated by the defendant on Michigan Avenue at the intersection of 119th street.

An affidavit of merits was filed by the defendant to the effect that if Walter Marcisz was injured and if the plaintiff has expended money in attempting to cure his son of his injuries, it was because of the negligence of Walter Marcisz himself.

This case was tried before the court and a jury, and resulted in a verdict of \$110 for the plaintiff, upon which the trial court entered a judgment, and from which the defendant appeals to this court.

In the consideration of the errors assigned by the defendant on this appeal, it appears from the record that the plaintiff did not enter his appearance and as a result we are not aided by a brief filed in his behalf.

From the facts it appears that the plaintiff's son, on the morning of April 3, 1926, boarded a street car at 127th street and Indiana Avenue to go to a bakery at 119th street

340042

MARTIN LUTHER KING, JR.

Appellant.

v.

ANTONIO VILLALBA

Appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U.S. DEPARTMENT OF JUSTICE

2001 A. 610

Opinion filed Jan. 28, 1931

THE JUSTICE HEREIN delivered the opinion of the court.

This is a tort action by the plaintiff against the defendant in the Municipal Court of Chicago to recover money expended for medical services rendered to his minor son who was injured on April 3, 1928, while exercising the care and control for his own safety, by a car controlled and negligently operated by the defendant on Michigan Avenue at the intersection of Fifth Street.

A writ of habeas corpus was filed by the defendant to the effect that if any further money was expended and if the plaintiff was expending money in attempting to cure his son of his injuries, it was because of the negligence of the defendant himself.

This case was tried before the court and a jury, and resulted in a verdict of \$100 for the plaintiff, upon which the trial court entered a judgment, and from which the defendant appeals to this court.

In the consideration of the entire evidence by the defendant on this appeal, it appears from the record that the plaintiff did not enter his complaint and as a result he was not aided by a writ filed in his behalf.

From the facts it appears that the plaintiff's son, on the morning of April 3, 1928, boarded a street car at Fifth Street and Indiana Avenue to go to a bakery at Fifth Street

and Michigan avenue. The car came to a stop a few feet south of the 119th street crosswalk. There was snow on the ground, but the day was clear. Walter Marcisz alighted from the street car and proceeded around the rear of the car toward the bakery on the west side of the street. He was a bright and active boy, and at the time was eleven years of age and had used street cars every day in going to and from school.

The evidence is conflicting as to just what the boy did at or before the time of the accident, and also what the defendant did in the operation of the automobile that he was driving at the time the boy was injured. The controversy in this matter is over the moneys expended by the plaintiff for doctors and other medical expenses in the cure of his minor son from the injuries inflicted by the alleged negligent conduct of the defendant in the operation of the automobile.

The trial court instructed the jury orally, and the defendant complains to the part of the oral charge which is in these words:

"You are instructed that if you believe from all of the evidence that the defendant was guilty of negligence, still if you further believe from all the evidence that Walter Marcisz failed to exercise that degree of care and caution which a person of his age, capacity and experience may reasonably be expected to use in the same situation and under like circumstances, and that by so failing to use such care and caution the injury to him would not have occurred, then and in that event you are instructed that the said Walter Marcisz was guilty of contributory negligence, in which event, if you so find, the plaintiff cannot recover and your verdict should be not guilty.

You are instructed further that a child of the age of ten or eleven years is not held to the same degree of care as adult persons."

The contention of the defendant is to the effect that the charge is clearly erroneous and prejudicial, and that it removes from the consideration of the jury the possibility that Walter Marcisz ought under the circumstances, and in view of his age, capacity and experience, to have exercised the same

and Michigan Avenue. The car came to a stop a few feet south of the 11th street crosswalk. There was snow on the ground.

but the day was clear. Walter Marston alighted from the

street car and proceeded around the rear of the car toward

the bakery on the west side of the street. He was a bright

and active boy, and at the time was eleven years of age and

had been in school every day in going to and from school.

The evidence is conflicting as to just what the boy

did at or before the time of the accident, and also what the

defendant did in the operation of the automobile that he was

driving at the time the boy was injured. The controversy in

this matter is over the money expended by the plaintiff for

doctors and other medical expenses in the cure of his minor

son from the injuries inflicted by the alleged negligent conduct

of the defendant in the operation of the automobile.

The trial court instructed the jury orally, and the

defendant complains to the part of the oral charge which is in

these words:

"You are instructed that if you believe from all of the evidence that the defendant was guilty of negligence, still if you further believe from all the evidence that Walter Marston failed to exercise due regard of care and caution which a person of his age, capacity and experience may reasonably be expected to use in the same situation and under like circumstances, and that by so failing to use such care and caution the injury to him would not have occurred, then and in that event you are instructed that the said Walter Marston was guilty of contributory negligence, in which event, if you so find, the plaintiff cannot recover and your verdict should be not guilty. You are instructed further that a child of the age of ten or eleven years is not held to the same degree of care as adult persons."

The contention of the defendant is to the effect

that the charge is clearly erroneous and prejudicial, and that

it removes from the consideration of the jury the possibility

that Walter Marston might under the circumstances, and in view

of his age, capacity and experience, so have exercised the same

degree of care as an adult, and that it is for the jury to determine the degree of care required of a child of eleven years, and when the court instructs the jury that they are not to hold such child to the same degree of care as an adult, it is invading the province of the jury and committing error highly prejudicial to the defendant.

One of the questions of importance in this case is, did the plaintiff's son exercise that degree of care and caution for his own safety imposed upon him by law, at the time and place of the accident? This of course is vital, and under the facts is a question for the jury. It is important that they should have been accurately instructed by the court as to what constituted the degree of care to be exercised on the part of Walter Marcisz. It is a settled rule in this state that a child under the age of seven years is presumed, as a matter of law, to be incapable of exercising ordinary care, and is not to be charged with contributory negligence, but beyond that age no definite rule can be applied to all infants above the age of seven years; still a jury in determining the question of contributory negligence should be guided by the court's instruction to the effect that the age, capacity, experience, and ability to understand and comprehend danger and to care for himself, under the circumstances surrounding him at and just prior to the accident, as shown by the proof, are to be considered by the jury, and it has been held as the law in this state that if he possesses the capacity of an adult, the law requires him to exercise the same degree of care as though he were an adult.

From the evidence it is apparent that this boy, the son of the plaintiff in this case, was familiar with the use

degree of care as an adult, and that it is for the jury to determine the degree of care required of a child of eleven years, and when the court instructs the jury that they are not to hold such child to the same degree of care as an adult, it is in- vading the province of the jury and committing error highly pre- judicial to the defendant.

One of the questions of importance in this case is,

did the plaintiff's son exercise that degree of care and caution for his own safety imposed upon him by law, at the time and place of the accident? This of course is vital, and under the facts is a question for the jury. It is important that they should have been accurately instructed by the court as to what constituted the degree of care to be exercised on the part of either party. It is a settled rule in this state that a child under the age of seven years is presumed, as a matter of law, to be incapable of exercising ordinary care, and is not to be charged with contributory negligence, and beyond that age no definite rule can be applied to all infants above the age of seven years; still a jury in determining the question of contributory negligence should be guided by the court's instruction to the effect that the age, capacity, experience, and ability to understand and comprehend danger and to care for himself, under the circumstances surrounding him at and just prior to the accident, as shown by the proof, are to be con- sidered by the jury, and it has been held on the law in this state that if he possesses the capacity of an adult, the law requires him to exercise the same degree of care as though he were an adult.

From the evidence it is apparent that this boy, the

son of the plaintiff in this case, was familiar with the use

of street cars in going to and from his school, and that he had had experience in entering and alighting from street cars, and in the use of the street, and the jury in determining the question of whether this boy was guilty of contributory negligence should have been properly instructed so that the jury would not be confused by the instruction such as we have in this case that a child of the age of ten or eleven years is never required to exercise the same degree of care as an adult, and it was erroneous for the court to so instruct the jury. This question has been passed upon ^{by} the Appellate Court in the case of Wabash R. R. Co. v. Jones, 121 Ill. App. 390, in which it is said:

"It has been definitely settled in this state that a child under the age of seven years, is presumed, as a matter of law, to be incapable of exercising ordinary care, and therefore not to be chargeable with contributory negligence; but beyond that age no such presumption prevails, Metal Co. v. Weber, 196 Ill. 526; R. Co. v. Tuohy, 196 Ill., 410; R. Co. v. Jernigan, 198 Ill. 297.

Inasmuch as appellee was above the age of seven years, the question as to whether he was guilty of contributory negligence was to be determined by the jury, not from his age alone, but also from his intelligence, experience, and ability to understand and comprehend danger, and to care for himself. Metal Co. v. Weber; R. Co. v. Tuohy; R. Co. v. Jernigan, *supra*.

In determining the question it was the duty of the jury to take into consideration the age, capacity and experience of appellee, together with the circumstances surrounding him at and just prior to the accident, as shown by the proof, and from these facts determine whether he acted with the care and caution for his own safety that one of his age, capacity and experience ordinarily would have exercised under similar circumstances.

The second instruction read to the jury at the request of appellee, was as follows:

'The court instructs the jury that a child is not required by law to exercise the same degree of care and caution to avoid injury as is a person of mature years, and that a child is only held to the exercise of such degree of care and caution as children of his age, capacity and intelligence are capable of exercising.'

The instruction was inaccurate and, under the facts in this case, seriously misleading. While it cannot be said

of street cars in going to and from his school, and that he had had experience in entering and alighting from street cars, and in the use of the street, and the jury in determining the question of whether this boy was guilty of contributory negligence should have been properly instructed so that the jury would not be confused by the instruction such as we have in this case that a child of the age of ten or eleven years is never required to exercise the same degree of care as an adult, and it was erroneous for the court to so instruct the jury. This question has been passed upon by the Appellate Court in the case of Thompson v. City of Chicago, 183 Ill. App. 300, in which it is said:

"It has been definitely settled in this state that a child under the age of seven years is presumed, as a matter of law, to be incapable of exercising ordinary care, and therefore not to be chargeable with contributory negligence; but beyond that age no such presumption prevails. Thompson v. City of Chicago, 183 Ill. App. 300; Thompson v. City of Chicago, 183 Ill. App. 300; Thompson v. City of Chicago, 183 Ill. App. 300.

Inasmuch as negligence measures the age of seven years, the question as to whether he was guilty of contributory negligence was to be determined by the jury, not from his age alone, but also from his intelligence, experience, and ability to understand and comprehend danger, and to care for himself. Thompson v. City of Chicago, 183 Ill. App. 300.

In determining the question it was the duty of the jury to take into consideration the intelligence, experience of the child, together with the circumstances surrounding him at and just prior to the accident, as shown by the facts, and then make a determination whether he acted with the care and caution for his own safety that one of his age, capacity and experience ordinarily would have exercised under similar circumstances.

The second instruction read to the jury at the request of appellee, was as follows:

'The court instructs the jury that a child is not required by law to exercise the same degree of care and caution as would be required of a person of full years, and that a child is only held to the exercise of such degree of care and caution as is called for by his age, capacity and intelligence are a child of exercising.

The instruction was incorrect, and, under the facts in this case, seriously misleading. While it cannot be said

as a general rule that all infants above the age of seven years are required to exercise the same degree of care as an adult, such as one is, as we have said, required to exercise such degree of care as a person of like age, intelligence, experience and capacity for understanding and avoiding the danger might reasonably be expected to exercise under similar circumstances and surroundings; and if he possesses the capacity of an adult the law requires him to exercise the same degree of care and prudence as though he were an adult. The jury may reasonably have inferred from the instruction that a child is never required to exercise the same degree of care as an adult."

In the case of Chicago & Alton R. R. Co. v. Becker, 76 Ill. 25, the Supreme Court uses this language in passing upon a similar question that was before it, and held that the following direction in one of the instructions was erroneous:

"The court instructs the jury that the law does not require that a boy of six or seven years of age should exercise that degree of diligence that would be required of a grown person."

and the court passing upon this instruction says:

"The age, the capacity and discretion of the deceased to observe and avoid danger, were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess. The first branch of the instruction was erroneous, in assuming facts, and drawing conclusions of law from them."

There were other questions raised on this appeal, but in view of the conclusions we have reached it will not be necessary to pass upon them.

The judgment is reversed and the cause remanded to the Municipal Court of Chicago.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

as a general rule that all infants above the age of seven years are required to exercise the same degree of care as an adult, such as one is, as we have said, required to exercise such degree of care as a person of like age, intelligence, experience and capacity for understanding and avoiding the danger might reasonably be expected to exercise under similar circumstances and surroundings, and if he possesses the capacity of an adult the law requires him to exercise the same degree of care and prudence as though he were an adult. The jury may reasonably have inferred from the instruction that a child is never required to exercise the same degree of care as an adult.

In the case of Chicago & Alton R. Co. v. Hecker,

28 Ill. 25, the Supreme Court made this language in passing upon a similar question that was before it, and held that the following direction in one of the instructions was erroneous:

"The court instructs the jury that the law does not require that a boy of six or seven years of age should exercise the degree of diligence that would be required of a grown person."

and the court passing upon this instruction says:

"The age, the capacity and discretion of the deceased to observe and avoid danger, were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess. The first branch of the instruction was erroneous, in assuming facts, and drawing conclusions of law from them."

There were other questions raised on this appeal, but

in view of the conclusions we have reached it will not be

necessary to pass upon them.

The judgment is reversed and the cause remanded to

the Municipal Court of Chicago.

JUDGMENT (17-102) 11-1-1911

WILSON, J. L. AND FRIEND, J. CONCUR.

33 7
34015

J.K. HARRIS, doing business as
J.K. HARRIS & CO.,

Appellant,

v.

LOGAN SQUARE THEATRE CO., a Corporation,
and ALBERT SABATH,

Appellees.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

260 I.A. 616²

Opinion filed Jan. 28, 1931

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an appeal from an order vacating a judgment entered more than thirty days prior to the entry of the order now before this court.

The plaintiff obtained a judgment in the Municipal Court of Chicago on May 31, 1929, against Albert Sabath and the Logan Square Theatre Company in the sum of \$558.84. On September 6, 1929, a notice was served that Albert Sabath would present a petition and ask for leave to file the same in support of a motion to vacate said judgment, which petition was considered by Judge Hartigan, one of the judges of the Municipal Court, and on the 18th day of September, 1929, the motion to vacate the judgment was allowed.

It is contended by the plaintiff that a reversal or recall of a judgment by a trial court cannot be had except for errors of fact, and only such as could have been corrected by the writ of coram nobis at common law. Questions of pleading in the original case or questions averred in the pleading upon which issue might have been taken, or questions of fact, the basis of the cause of action or defense, cannot be raised by this motion.

34018

J. E. HARRIS, doing business as
J. E. HARRIS & CO.,

Appellant,

v.

LOUIS SQUARE THEATRE CO., a Corporation,
and ALBERT SABAETH,

Appellees.

MUNICIPAL COURT,

OF CHICAGO.

300 I.A. 616

Opinion filed Jan. 28, 1931

MR. JUSTICE HENSH delivered the opinion of the court.
This is an appeal from an order vacating a judgment
entered more than thirty days prior to the entry of the order
now before this court.

The plaintiff obtained a judgment in the Municipal
Court of Chicago on May 31, 1929, against Albert Sabaeth and
the Louis Square Theatre Company in the sum of \$558.84. On
September 8, 1929, a notice was served that Albert Sabaeth
would present a petition and ask for leave to file the same
in support of a motion to vacate said judgment, which petition
was considered by Judge Harrison, one of the judges of the
Municipal Court, and on the 16th day of September, 1929, the
motion to vacate the judgment was allowed.

It is contended by the plaintiff that a reversal
or recall of a judgment by a trial court cannot be had except
for errors of fact, and only such as could have been corrected
by the writ of coram nobis at common law. Questions of
pleading in the original case or questions arising in the
pleading upon which leave might have been taken, or questions
of fact, the basis of the grant of motion or defense, cannot
be raised by this motion.

To this contention, the defendant answers by urging that the rule of law applicable is that where the sufficiency of such petition is not questioned by a demurrer, by motion to dismiss, by a plea of Nulla est erratum, or by some other proper mode to test the validity thereof, no question of law or fact can arise in the Appellate Court upon an appeal, as to the sufficiency, and that no questions of law or fact were preserved by a bill of exceptions or stenographic report.

The record in this case contains the original judgment, the petition of the defendant Sabath, which was filed on the 6th day of September, 1929, and the order entered by the court on the 18th day of September, which order is in words and figures as follows:

"It is ordered by the court that the petition and motion of the defendants heretofore entered herein to vacate judgment of May 31, 1929, be and the same is hereby sustained.

It is further ordered by the Court that the hearing on merits be and the same is hereby set for October 8, 1929. Plaintiff excepts."

From this order the plaintiff prayed for and was allowed an appeal to this court, and thirty days was granted in which to file a bill of exceptions. No bill of exceptions appears in the record.

The action of the court was based upon a finding that there was error of fact in assuming jurisdiction when the order complained of was entered.

The established rule in this state is that in order to present to this court as a question of law whether there is any evidence in the record to sustain the order of the Municipal Court in vacating the ex parte judgment, it is necessary to submit the question to the trial court as one of law by some mode that would call for a ruling upon it. This

To this contention, the defendant answers by urging that the rule of law applicable is that where the sufficiency of such petition is not questioned by a demurrer, by motion to dismiss, by a plea of nulla est actio, or by some other proper mode so that the validity thereof, no question of law or fact can arise in the Appellate Court upon an appeal, as to the sufficiency, and that no question of law or fact was preserved by a bill of exceptions or stenographic report. The record in this case contains the original judgment, the petition of the defendant which was filed on the 25th day of September, 1938, and the order entered by the court on the 18th day of September, which order is in words and figures as follows:

"It is ordered by the court that the petition and motion of the defendant heretofore entered herein to vacate judgment of May 31, 1938, be and the same is hereby sustained. It is further ordered by the Court that the hearing on merits be and the same is hereby set for October 8, 1938. Plaintiff execute."

From this order the plaintiff prayed for and was allowed an appeal to this court, and thirty days was granted in which to file a bill of exceptions. No bill of exceptions appears in the record. The action of the court was based upon a finding that there was error of fact in examining jurisdiction when the order complained of was entered.

The established rule in this state is that in order to present to this court as a question of law whether there is any evidence in the record to sustain the order of the Municipal Court in vacating the ex parte judgment, it is necessary to submit the question to the trial court as one of law by some mode that would call for a ruling upon it. This

was not done by the plaintiff in this case. No issue of law was made upon the motion to vacate, and its sufficiency to support the order vacating the judgment was not questioned. Central Bond Co. v. Roesser, 323 Ill. 90.

By Section 21 of the Municipal Court Act, the court is given jurisdiction to entertain a motion to set aside for errors in fact a judgment rendered by it more than thirty days before the motion is entered. The court has the power to pass upon the motion where on its face it discloses any such error. The fact that the court decides that the motion shows such error in fact, does not deprive it of its jurisdiction in the particular case because it erred in its conclusion.

The record in this case does not disclose any motion of the plaintiff objecting to the sufficiency of the motion or petition, as a matter of law, which calls for a ruling by the court. The only thing that appeared in the record at the time the court entered the order was the exception by the plaintiff. The record does not comply with the rule announced by the Supreme Court, and therefore the matter is not properly before this court to pass upon the question whether the petition and motion on its face discloses any error in fact that would justify the trial court in assuming jurisdiction.

The Supreme Court in the case of Central Bond Co. v. Roesser, *supra*, considered the question in that case arising out of a motion made by the defendant 47 days after the entry of the judgment, to vacate the same. The court cited, with approval, the case of Harris v. Chicago House Wrecking Co., 314 Ill. 500, relied upon by both the parties in this case, and announced this rule:

"Whether or not an error in fact had been committed in the proceeding which resulted in the ex parte judgment in favor of appellant was purely a question of

was not done by the plaintiff in this case. No issue of law was made upon the motion to vacate, and its sufficiency to support the order vacating the judgment was not questioned. Quinn v. Board of Health, 383 Ill. 50.

My Section 21 of the Municipal Court Act, the court is given jurisdiction to entertain a motion to set aside for error in fact a judgment rendered by it more than thirty days before the motion is entered. The court has the power to pass upon the motion when on its face it discloses any such error. The fact that the court decides that the motion shows such error in fact, does not deprive it of its jurisdiction in the particular case because it arises in its conclusion.

The record in this case does not disclose any motion of the plaintiff objecting to the sufficiency of the motion or position, as a matter of law, which calls for a ruling by the court. The only thing that appeared in the record at the time the court entered the order was the execution by the plaintiff. The record does not comply with the rule announced by the Supreme Court, and therefore the matter is not properly before this court to pass upon the question whether the petition and motion on its face discloses any error in fact that would justify the trial court in assuming jurisdiction.

The Supreme Court in the case of Central Bond Co. v. Board of Health, considered the question in that case arising out of a motion made by the defendant 27 days after the entry of the judgment, to vacate the same. The court cited, with approval, the case of Morris v. Chicago House Wrecking Co., 314 Ill. 500, relied upon by both the parties in this case, and announced this rule:

"Whether or not an error in fact had been committed in the proceeding which resulted in the ex parte judgment in favor of appellee was purely a question of

fact. It was necessary to establish such error by evidence dehors the record. (Domitski v. American Linseed Co., *supra*; Mitchell v. King, *supra*.) The municipal court decided that in the rendition of its judgment an error in fact had been committed. To present to this court as a question of law whether there is any evidence in the record to sustain the order of the municipal court vacating the ex parte judgment or the judgment of the Appellate Court affirming the municipal court's order, it was necessary to submit the question to the municipal court as one of law by some mode that would call for a ruling upon it. Such a course is necessary to preserve the question as one of law even though there is no conflict in the evidence upon which the trial court based its finding. (Sun Mutual Ins. Co. v. Barrel Co., 114 Ill. 99; Domitski v. American Linseed Co., *supra*.) Appellant did not follow this course, and the question whether the affidavit showed any error in fact in the former proceeding cannot, therefore, be considered."

Since 1911, when the Practice Act was amended, Section 81 has provided that an adverse ruling upon questions submitted by a party to the court, shall be a matter for review upon appeal or writ of error, without the formality of exception, upon a party submitting a bill of exceptions or a stenographic report of the trial containing the evidence and the rulings of the court within the time allowed by the trial court. This rule does not apply to motions made during the progress of the case or other proceedings not occurring during the trial. Rulings in respect to such motions or proceedings must be preserved at the time or within such time as the court may be allowed during the term. Village of Bradley v. N.Y.C.R.R. Co. 298 Ill. 383.

In the case of Comrs. of Sub-Drain, Dist. v. Carroll, 295 Ill. 482, the court says:

"The clerk in entering the order allowing the motion to strike the objections from the files has included the statement that the objectors excepted, and the plaintiffs in error have assigned this action of the court as error, but no bill of exceptions containing the motion and the action of the

that it was necessary to establish such error by evidence before the record. (Harris v. American National Bank, 111 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Since 1911, when the provision was amended, Section 81 has provided that an adverse ruling upon questions submitted by a party to the court, shall be a matter for review upon appeal or writ of error, without the formality of exception, upon a party submitting a bill of exceptions or a stenographic report of the trial containing the evidence and the rulings of the court within the time allowed by the trial court. This rule does not apply to motions made during the progress of the case or other proceedings not occurring during the trial. Rulings in respect to such motions or proceedings may be preserved at the time or within such time as the court may be allowed during the term. Village of Bradley v. B.N.B. Co.

338 Ill. 283.

In the case of Board of Education v. Chicago

338 Ill. 438, the court says:

"The clerk in entering the order allowing the motion to strike the objections from the bill has included the statement that the objections excepted and the allegations in error have assigned this section of the court as error, but no bill of exceptions containing the motion and the action of the

court thereon appears in the record. In this condition of the record we cannot review the decision of the court upon the motion. It has been many times held that the action of the court upon such motions can not be considered unless the motion, decision and an exception thereto are preserved by a bill of exceptions. Where there is no bill of exceptions the motion and decision do not become a part of the record, and it will be conclusively presumed that the action of the court was correct. (Gaynor v. Hibernia Savings Bank, 166 Ill. 577; Town of Scott v. Artman, 237 id. 394; People v. American Life Ins. Co. 267 id. 504)."

The part of the record that the plaintiff considers sufficient to raise the question before this court is that he excepted when the order complained of was entered. We are unable to concur in such contention, nor can we infer from that fact that the plaintiff objected that the motion made by the defendant Sabath was insufficient to support the order vacating the judgment for the reason that the plaintiff did not submit the question to the Municipal Court as one of law by some mode that would call for a ruling. Since the plaintiff failed to file a bill of exceptions showing the ruling of the court on a motion, if any was made by the plaintiff, it will be presumed that the action of the court was correct.

The order vacating the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

only reason appears in the record. In this
decision of the record we cannot review the
decision of the court upon the motion. It has
been many times held that the action of the
court upon such motions can not be considered
unless the action, decision and an exception
thereof are preserved by a bill of exceptions.
Where there is no bill of exceptions the action
and decision do not become a part of the record,
and it will be conclusively presumed that the
action of the court was correct. (Seymour v.
Hibernia Savings Bank, 188 Ill. 577; Town of
Scott v. Atwater, 237 Ill. 384; People v. American
Life Ins. Co. 287 Ill. 304).

The part of the record that the plaintiff considers
sufficient to raise the question before this court is that
he requested when the order complained of was entered. He
was unable to present in such condition, nor was he inter-
viewed that fact that the plaintiff objected that the motion
made by the defendant which was insufficient to support the
order vacating the judgment for the reason that the plaintiff
did not submit the question to the Municipal Court as one of
law by some mode that would call for a ruling. Since the
plaintiff failed to file a bill of exceptions showing the
ruling of the court on a motion, it may be made by the
plaintiff, it will be presumed that the action of the court
was correct.

The order vacating the judgment is affirmed.

REVEREND

WITNESSETH, I, J. L. ANDERSON, J. CLERK.

34037

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

MARIE FUSCO,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 616³

Opinion filed Jan. 28, 1931

MR. JUSTICE NEBEL delivered the opinion of the court. Plaintiff in error, hereinafter called the defendant was convicted in the Municipal Court of Chicago on the charge of contributing to the delinquency of Ruby Ross a female child of the age of sixteen years. The defendant entered a plea of not guilty and waived a trial by jury. The court, after hearing the evidence, found the defendant guilty, as charged, and fixed the sentence at 90 days of labor in the House of Correction and further to pay a fine of \$25.00, and entered judgment thereon, after denying motions for a new trial and in arrest of judgment. The defendant thereupon sued out a writ of error and the case is now before this court upon the errors assigned.

The defendant is charged with an offense set forth in an amended information filed July 26, 1929, as follows:

"That Leslie L. Ross of Chicago, gives the Court to be informed and understand that Marie Fusco, on the first day of July, A. D. 1929, at Chicago, did unlawfully, knowingly and wilfully encourage Ruby Ross, a female person under the age of 18 years, to-wit: 16 years of age, to be or become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Ruby Ross to be or to become a delinquent child in that she, the said Marie Fusco, did induce and encourage the said Ruby Ross to remain away from the

DATA I/O

The evidence presented at the trial was such as to lead the jury to believe that the defendant had committed the crime charged.

[illegible][illegible]

home of 'her parents without her parents' consent, and the said Marie Fusco did commit indecent acts upon the person and privates of the said Ruby Ross and cause the said Ruby Ross to commit indecent and lascivious acts and conduct, contrary to the form of the statute, etc."

The defendant urges that there is a reasonable doubt on the record of her guilt, and that where the evidence is of such character that a reviewing court cannot say that the guilt of the accused was proven beyond a reasonable doubt, it is the duty of the court to reverse.

The state replies to this contention, that where the testimony regarding material facts in issue is directly in conflict and irreconcilable and its conclusion in such case of necessity depends largely upon the credit to be given the opposing witnesses, it is the peculiar province of the court or jury to determine on which side of the controversy the truth lies.

It appears from the facts, that Ruby Ross was born July 15, 1912, and testified for the people, that while she was living with the defendant and sleeping in the same bed with her at the Hotel Maryland, Chicago, Illinois, in July and August, 1928, the defendant practiced acts of sex perversion upon the witness, that while she lived with the defendant, she did not have the consent of her parents to do so, and that the witness did not complain or mention such acts of the defendant until eleven months after the occurrence, when she did mention and complain of the acts to her mother and a Mrs. Rheta Coleman, a probation officer. There is evidence in the record that the defendant was advised to stay away from Ruby Ross. The parents of the girl were separated and had not lived together for 5 or 6 years. The mother worked downtown and occupied light housekeeping rooms. The daughter lived

some of her parents without her parents' consent, and the said Harry took the said independent vote upon the person and relatives of the said Harry Rose and caused the said Harry Rose to commit indecent and lascivious acts and conduct, contrary to the term of the statute, etc."

The defendant urges that there is a reasonable doubt

on the record of her guilt, and that where the evidence is of such character that a reviewing court cannot say that the guilt of the accused was proven beyond a reasonable doubt, it is the duty of the court to reverse.

The state replies to this contention, that where the

testimony regarding material facts in issue is directly in conflict and irreconcilable and its conclusion in such case of necessity depends largely upon the credit to be given the opposing witnesses, it is the peculiar province of the court or jury to determine on which side of the controversy the truth lies.

It appears from the facts, that Harry Rose was born July 15, 1912, and testified for the people, that while she was living with the defendant and residing in the same bed with her at the Hotel Maryland, Chicago, Illinois, in July and August, 1932, the defendant procured acts of sex perversion upon the witness, that while she lived with the defendant, she did not have the consent of her parents to do so, and that the witness did not complain or mention such acts of the defendant until eleven months after the occurrence, when she did mention and complain of the acts to her mother and a Mrs. Elmer Delaney, a probation officer. There is evidence in the record that the defendant was advised to stay away from Harry Rose. The parents of the girl were separated and had not lived together for 5 or 6 years. The mother worked downtown and occupied light housekeeping rooms. The daughter lived

with her mother until she left and remained away during July and August, 1938. Mrs. Anna Ross was acquainted with the defendant and her parents.

The defendant denied that she was guilty of any of the acts testified to by Ruby Ross, and further testified that she had known Mrs. Ross, the mother of the complaining witness for about three and a half years, that Mrs. Ross is acquainted with her parents, and that upon several occasions in July, the mother remained all night with the defendant, and it also appears from her evidence, that she admired Ruby and that everything she did for her was for her good, and that she advised her to return home, but Ruby replied, "that she couldn't get along with her father and mother and would not stay home."

It is also in evidence that several witnesses testified that the defendant's reputation for chastity and morality is good, and that evidence stands uncontradicted in the record. It is also in evidence that the reputation of Ruby Ross for truth and veracity among her friends and associates is bad, which was made an issue by witnesses who testified to the contrary.

There appears to be some feeling in this case, which is usual in a case of this character, but notwithstanding the character of this act, which is repulsive and has a tendency to prejudice and cause a feeling of hostility, the defendant has the support of friends who appeared and testified. The reputation of the defendant is not questioned in any respect so far as anything appears in this record.

That Orlando F. Scott, a physician and surgeon, examined the defendant on August 6, 1939, at his office, that he found she was intelligent, her reflexes were all normal, and the physical and mental examinations were negative, and in

with her mother until she left and remained away during July and August, 1933. Mrs. Anna Rose was acquainted with the defendant and her parents.

The defendant denied that she was guilty of any of the acts testified to by Ruby Rose, and further testified that she had known Mrs. Rose, the mother of the complaining witness for about three and a half years, that Mrs. Rose is acquainted with her parents, and that upon several occasions in July, the mother remained all night with the defendant, and it also appears from her evidence, that she advised Ruby and that everything she did for her was for her good, and that she advised her to return home, but Ruby replied, "that she couldn't get along with her father and mother and would not stay home."

It is also in evidence that several witnesses testified that the defendant's reputation for honesty and morality is good, and that evidence stands uncontradicted in the record. It is also in evidence that the reputation of Ruby Rose for truth and veracity among her friends and associates is bad, which was made an issue by witnesses who testified to the contrary. There appears to be some feeling in this case, which is usual in a case of this character, and notwithstanding the character of this act, which is repulsive and has a tendency to prejudice and cause a feeling of hostility, the defendant has the support of friends who appeared and testified. The reputation of the defendant is not questioned in any respect so far as anything appears in this record.

That Orlando F. Root, a physician and surgeon, examined the defendant on August 6, 1933, at his office, that he found she was intelligent, her reflexes were all normal, and the physical and mental examinations were negative, and in

his opinion from her history she was normal and in no way a sex pervert.

It is regrettable that this girl Ruby Ross did not have the companionship of her father and mother to counsel and advise her. The separation of the parents was unfortunate for her, for which, of course, she was not responsible; nor is the defendant for this unfortunate situation.

The rule is that it is the function of a court or jury to whom a cause is submitted to pass upon the credibility of witnesses and the weight of the evidence, and to determine from the appearance of the witnesses and from their testimony the truth of their several statements, and to decide where the truth lies. A reviewing court is always reluctant to reverse a judgment of conviction on the ground that it is not warranted by the testimony, but where the evidence is of such a character that a reviewing court cannot say the guilt of the accused was proved beyond a reasonable doubt, it is its duty to reverse the judgment. People v. Kemming, 311 Ill. 50.

The testimony in this case establishes the fact that the defendant has always borne a good reputation for chastity and morality, and the conviction stands upon the testimony of Ruby Ross, whose reputation for truth and veracity is disputed, and the further fact that 11 months passed between the time of the commission of these acts and the complaint of this girl, which create a doubt of the truth of the charge. When the complaint is not made immediately, unless the delay is satisfactorily explained, its value as evidence is much weakened. Cunningham v. The People, 210 Ill. 410. While evidence of good reputation, where the proof is

his opinion from her history she was natural and in no way
a sex pervert.

It is regrettable that this girl Ruby Ross did not

have the companionship of her father and mother to counsel
and advise her. The separation of the parents was unfortunate
for her, for which, of course, she was not responsible; nor
is the defendant for this unfortunate situation.

The rule is that it is the function of a court or
jury to whom a cause is submitted to pass upon the credibility
of witnesses and the weight of the evidence, and to determine
from the appearance of the witnesses and from their testimony
the truth of their several statements, and to decide there
the truth lies. A reviewing court is always reluctant to
reverse a judgment of conviction on the ground that it is
not warranted by the testimony, and where the evidence is
of such a character that a reviewing court cannot say the
guilt of the accused was proved beyond a reasonable doubt,
it is its duty to reverse the judgment. People v. Lemmon.

311 Ill. 50.

The testimony in this case establishes the fact
that the defendant has always borne a good reputation for
sobriety and morality, and the conviction stands upon the
testimony of Ruby Ross, whose reputation for truth and
veracity is disputed, and the further fact that 11 months
passed between the time of the commission of these acts and
the complaint of this girl, which creates a doubt of the truth
of the charge. When the complaint is not made immediately,
unless the delay is satisfactorily explained, its value as
evidence is much weakened. Guinn v. The People, 310 Ill.
410. While evidence of good reputation, where the proof is

clear as to a defendant's guilt, is entitled to but little weight, in a doubtful case proof of good reputation often turns the scale in favor of a defendant and entitles the person charged to an acquittal. Gunningham v. The People, supra.

We have examined the evidence and from a consideration of all the facts in this record the court is of the opinion that there is a reasonable doubt of the guilt of the defendant, and it is therefore its duty to reverse the judgment of the Municipal Court of Chicago.

Whether a cause should be remanded depends upon the circumstances of the particular case. The People v. Hartsig, 239 Ill. 348. We have reached the conclusion from the facts in the record in this case that the court will not be justified in remanding the cause.

JUDGMENT REVERSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

clear as to a defendant's guilt, is entitled to but little weight, in a doubtful case, proof of good reputation often turns the scale in favor of a defendant and entitles the person charged to an acquittal. Thompson v. The People, 20 Ill. 221. To have examined the evidence and from a comparison

of all the facts in this record the court is of the opinion that there is a reasonable doubt of the guilt of the defendant, and it is therefore its duty to reverse the judgment of the Municipal Court of Chicago.

Whether a case should be remanded depends upon the circumstances of the particular case. The People v. Martin, 20 Ill. 221. We have removed the conviction from the facts in the record in this case and the court will not be justified in remanding the cause.

FORWARD REVEREND.

WILLIAM W. L. AND WILSON, J. CORPUS.

34069

OSCAR JOHNSON,
Appellee,

v.

SILVESTER CAMINITI,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

260 I.A. 616⁴

Opinion filed Jan. 28, 1931.

MR. JUSTICE NEBEL delivered the opinion of the court.

This is a suit by the plaintiff to recover damages from the defendant.

It is alleged in the declaration that the defendant is guilty of malicious prosecution and false imprisonment, to which the defendant filed a plea of the general issue. Upon a trial before the court and a jury, a verdict was returned finding the defendant guilty and assessing the damages at \$2,000.00, and the court entered a judgment after overruling a motion for a new trial. The case is now before this court on appeal.

The facts are that the plaintiff entered into a contract with the defendant on the 17th day of September, 1924, for the sale of a farm to defendant for the sum of \$4,000, located near Breedsville, Michigan. Upon signing the contract the plaintiff received a deposit of \$200.00. The parties thereupon took the title papers to the defendant's attorney for examination, and the attorney found that the plaintiff had title, subject to a life interest in the farm in Lars J. Johnson and Mathilda J. Johnson, his wife, and the plaintiff was advised to furnish the necessary abstract for examination and the papers in connection therewith, and deliver the same to the attorney for the defendant, which he promised to do.

SECRET

Opinion filed Jan. 28, 1931

...the defendant, from the defendant, it is alleged in the fact that the defendant is guilty of malicious prosecution and false imprisonment, to which the defendant filed a plea of not guilty. Upon a trial before the court and a jury, a verdict was returned finding the defendant guilty and assessing the damages at \$10,000.00, and the court entered a judgment after consulting a motion for a new trial. The case is now before this court on appeal.

The facts are that the plaintiff entered into a contract with the defendant on the 17th day of October, 1934, for the sale of a tract of land for the sum of \$10,000.00, located near Bradaville, Michigan, upon which the contract was to be paid in installments of \$1,000.00. The plaintiff received the title to the land in the name of the defendant's attorney for examination, and the attorney found that the title was subject to a life interest in the tract in favor of John and Mary L. Johnson, his wife, and the plaintiff was advised to furnish the necessary abstract for examination and the papers in connection therewith, and after the same had been examined by the attorney for the defendant, it was found that the

A considerable time after the signing of the contract, the defendant signed and was sworn to a complaint, on April 13, 1927, before the Hon. John J. Lupe, one of the judges of the Municipal Court of Chicago, which recites that Oscar Johnson did on the 17th day of September, 1924, at Chicago, etc., and then and there obtained the confidence of said Sylvester Caminiti in selling said Sylvester Caminiti a farm in the State of Michigan, of which farm said Oscar Johnson then and there represented himself to be the owner, which in fact he did not own, or have permission to sell or dispose of said property; that a warrant was issued and the plaintiff was arrested and imprisoned.

On the trial based upon said complaint of said offense the Municipal Court discharged the said Oscar Johnson, and he thereupon instituted this suit, which resulted in the judgment now before this court.

The important question in this case was the want of probable cause when the defendant caused the arrest and imprisonment of the plaintiff. This was considered so, for the plaintiff offered in evidence certain exhibits, being a certified copy of the proceeding with reference to the arrest and discharge of the defendant, an abstract, deed from Lars. J. Johnson and Mathilda J. Johnson, and a deed from Francis Johnson, Lars Johnson and Mathilda Johnson to Sylvester Caminiti. The following appears from the record:

"Mr. Hagan: You spoke of a bill of sale.

A. I did.

Q. Is this the bill of sale?

A. It is.

Mr. Hagan: I offer it in evidence, ask it be marked Exhibit 5.

(Whereupon said document was accordingly marked by the reporter.)

Mr. Gigliotti: Of course, your Honor, I object to this and give you the reason of the objection, only for identification.

A considerable time after the signing of the contract, the defendant signed and was sworn to a complaint, on April 13, 1937, before the Hon. John J. Lube, one of the Judges of the Municipal Court of Chicago, which recites that Oscar Johnson did on the 17th day of September, 1934, at Chicago, etc., and then and there obtained the court's order, which recites that the plaintiff in selling said Sylvester Gaminitz a farm in the State of Michigan, of which farm said Oscar Johnson then and there represented himself to be the owner, which in fact he did not own, or have permission to sell or dispose of said property; that a warrant was issued and the plaintiff was arrested and imprisoned.

On the trial based upon said complaint of said offense the Municipal Court discharged the said Oscar Johnson, and he thereupon instituted this suit, which resulted in the judgment now before this court.

The important question in this case was the want of probable cause when the defendant caused the arrest and imprisonment of the plaintiff. This was considered so, for the plaintiff offered in evidence certain exhibits, being a certified copy of the proceedings with reference to the arrest and discharge of the defendant, an abstract, dated from March 1, 1937, and the defendant, and a deed from Francis Johnson, late Matthew J. Johnson, and a deed from Francis Johnson, late Johnson and Matthew Johnson to Sylvester Gaminitz. The following appears from the record:

"Mr. Barker: You spoke of a bill of sale.
A. I did.
Q. Is this the bill of sale?
A. It is.
Mr. Barker: I offer it in evidence, ask it be marked Exhibit B.
(Whereupon said document was accordingly marked by the reporter.)
Mr. District: Of course, Your Honor, I object to this and give you the reason of the objection, only for the fact that it is a bill of sale."

The Court: Yes, let those particular documents be marked for identification only, 1, 2, 3, 4, and 5, then I think the better practice is when you finish the case, to make an offer of all your exhibits and whatever objection the counsel cares to urge may be heard and pass upon them at that time.

Mr. Hagan: Any way is agreeable to me.

Mr. Gigliotti: Very well, I will state the objections right now if you want me to state the objections right now.

The Court: I don't care to hear them now. You may want to cross examine this witness in regard to those exhibits. Go ahead.

Mr. Hagan: I offer in evidence the second abstract which was produced by the witness, your Honor, so that the jury may see all of our papers, and ask it be marked our Exhibit 6.

Mr. Gigliotti: I offer my objection."

This court, from an examination of the record, does not find that the exhibits were offered in evidence, or that the court ruled upon the objections of the defendant. The only thing that does appear in the record is the suggestion by the court that the exhibits be marked for identification and at the close of the case the same be offered, at which time any objections to be made would be heard and passed upon by the Court.

The plaintiff testified that he offered the abstract and certain deeds to the farm in question to the defendant at his home for examination, and that the defendant refused to receive them, which the defendant denies. The purpose of these exhibits was to show that the defendant, without any probable cause, complained under oath, and caused a warrant to be issued by the Municipal Court for the arrest of the plaintiff, and that the trial upon said criminal charge resulted in his discharge, to which we have already referred.

This evidence is material upon this question, and was permitted to be considered by the jury when it retired for the purpose of considering a verdict.

The Court: Yes, let those particular documents be marked for identification only, 1, 2, 3, 4, and 5. Then I think the better practice is when you finish the case, to make an offer of all your exhibits and whatever objection the counsel wants to make may be heard and passed upon then at that time.

Mr. Hagan: Any way is agreeable to me.
Mr. Gifford: Very well, I will state the objections right now if you want me to state the objections right now.

The Court: I don't care to hear them now. You may want to cross-examine this witness in regard to those exhibits. Go ahead.

Mr. Hagan: I offer in evidence the second abstract which was produced by the witness, your Honor, so that the jury may see all of our papers, and ask if he marked our Exhibit B.
Mr. Gifford: I offer my objection.

This court, then an examination of the record, does

not find that the exhibits were offered in evidence, or that

the court ruled upon the objections of the defendant. The

only thing that does appear in the record is the suggestion

by the court that the exhibits be marked for identification

and at the close of the case the same be offered, at which time

any objections to be made would be heard and passed upon by

the court.

The plaintiff testified that he offered the abstract

and certain books to the jury in question to the defendant at

his home for examination, and that the defendant refused to

receive them, which the defendant denies. The purpose of these

exhibits was to show that the defendant, without any probable

cause, complained under oath, and obtained a warrant to be issued

by the municipal court for the arrest of the plaintiff, and that

the trial upon said criminal charge resulted in his discharge,

to which we have already referred.

This evidence is material upon this question, and was

permitted to be considered by the jury when it ruled for the

purpose of considering a verdict.

The defendant should have had an opportunity to examine these exhibits and make objections to their admissibility in evidence. The defendant offered to make objections at the time the exhibits were offered, but at the direction of the court the objections were to be passed upon by the court when the exhibits were offered by the plaintiff at the close of all the evidence. Casteel v. Millison, 41 Ill. App. 61, and the defendant, having accepted the suggestion of the trial court that he would have an opportunity to present his objections when the exhibits were offered by the plaintiff at the close of all the evidence, was at liberty to rest upon such ruling and there was no necessity to offer objections until the exhibits were offered, nor did the failure to further object have any tendency to operate as a waiver; and in this case, the court reserved ruling upon the admissibility of the exhibits until the objections of the defendant were ruled upon. Citing Anglo-American Packing Co. v. Baier, 20 Ill. App. 378; Weeks v. Jones, 200 Ill. App. 215.

For the reason that the exhibits were never admitted in evidence by the court and the consideration of these exhibits by the jury was error, the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The defendant should have had an opportunity to

examine these exhibits and make objections to their admissibility

in evidence, the defendant offered to make objections as

the time the exhibits were offered, but at the direction of

the court the objections were to be passed upon by the court

when the exhibits were offered by the plaintiff at the close

of all the evidence. Graves v. Wilson, 41 Ill. App. 31,

and the defendant, having accepted the suggestion of the trial

court that he would have an opportunity to present his

objections when the exhibits were offered by the plaintiff

at the close of all the evidence, was at liberty to rest

upon such ruling and there was no necessity to offer objections

until the exhibits were offered, nor did the failure to

further object have any tendency to operate as a waiver; and

in this case, the court reversed ruling upon the admissibility

of the exhibits until the objections of the defendant were

ruled upon. Gilling v. American Bookbinding Co. v. Baker, 30 Ill.

App. 378; Reese v. Jones, 30 Ill. App. 312.

For the reason that the exhibits were never admitted

in evidence by the court and the consideration of these

exhibits by the jury was error, the judgment is reversed and

the cause remanded.

REVEREND JUSTICE AND CHIEF JUSTICE.

WILSON, J., AND REVEREND J. GRONUM.

34093

GEORGE J. WILLIAMS,

Appellee,

v.

J. LEWIS STETTAEUR,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

200 I.A. 616⁵

Opinion filed Jan. 28, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This case comes before this court upon an appeal by the defendant ^{for} the judgment of the Municipal Court of Chicago confirming a judgment by confession entered in favor of the plaintiff for the sum of \$500.00 for rent claimed to have accrued under a certain lease.

Plaintiff's statement of claim alleges that there was due him from the defendant the sum of \$480.00 as rent for the months of April, May and June, 1929, and \$20.00 attorney's fees under and by virtue of a certain lease attached to the statement of claim, by which lease the plaintiff had demised to the defendant Flat No. 3 on the third floor of the building known as 1138 Hyde Park Boulevard, in the City of Chicago, at a rental of \$160.00 a month from the first day of May 1928, to the 30th day of April 1928, and to continue thereafter from year to year, unless either party should give 60 days notice of his intention to terminate the lease at the end of the year.

The defendant filed his notice and petition to set aside the judgment, and the motion was allowed to the extent that the defendant was to be given leave to plead and defend, the judgment to stand as security.

The case was tried by the court, after a jury was waived, and after a hearing the judgment entered was confirmed.

34083

JOHN J. MULLANE,
Respondent,
v.
J. J. MULLANE,
Appellant.

IN THE
COURT OF
COMMON PLEAS
OF THE COUNTY OF
COLUMBIA

34083

Opinion filed Jan. 28, 1931

MR. JUSTICE MULLANE delivered the opinion of the court.

This case comes before this court upon an appeal by the defendant from the judgment of the Municipal Court of Chicago confirming a judgment by settlement entered in favor of the plaintiff for the sum of \$100.00 for rent claimed to have accrued under a certain lease.

Plaintiff's statement of claim alleges that there was due him from the defendant the sum of \$100.00 as rent for the months of April, May and June, 1929, and \$20.00 attorney's fees under and by virtue of a certain lease attached to the statement of claim, by which lease the plaintiff had demised to the defendant first floor on the third story of the building known as 1132 Hyde Park Boulevard, in the city of Chicago, at a rental of \$100.00 a month from the first day of May 1928, to the 30th day of April 1930, and is to continue thereafter from year to year, unless six months' notice, five 60 days notice or five months' notice be furnished to terminate the lease at the end of the year.

The defendant filed his notice and petition to set aside the judgment, and the motion was allowed to the extent that the judgment was to be given leave to stand as security.

The case was tried by the court, after a jury was waived, and after a hearing the judgment entered was confirmed.

It appears from the evidence that the defendant entered into possession of the premises on or about the date of the lease, and paid \$160.00 for each month provided for by the lease. About a year and a half thereafter, the plaintiff installed a frigidaire refrigerator in the building and at the time of the installation the defendant agreed to pay \$5.00 additional. The subject of dispute is whether the \$5.00 to be paid each month is additional rent, or, as contended for by the plaintiff, the additional \$5.00 is a separate agreement; and to the same effect is the payment by the defendant of \$25.00 a month as rent for the garage of the plaintiff.

The defendant claims that the facts in evidence show that more than 60 days before April 30, 1928, when the lease by its terms was about to expire, the defendant, on February 19, 1928, informed plaintiff's agent Stuart that he desired a new written lease for one year from the expiration date of the then lease. Stuart assured the defendant that such a lease would be prepared, which however was never done. It also appears that the defendant's wife was operated on, and because of her weakened condition it would be impossible for her to live on the third floor and climb the stairs; that the defendant advised Stuart about this on the 19th day of February, 1929, and asked him for a first floor apartment; that Stuart told him that no first floor apartment was vacant, and it was then that the defendant informed Stuart it would be necessary for him to vacate the apartment on April 30, 1929; that the defendant's evidence also tends to show that the plaintiff put up a "for rent" sign on the building, and that he, the defendant, vacated the premises on or about April 30, 1929, which facts are disputed by the plaintiff not only as to the agency of Stuart, but also as to the date of the notice of

If appears from the evidence that the defendant entered into possession of the premises on or about the date of the lease, and paid \$180.00 for each month provided for by the lease. About a year and a half thereafter, the plaintiff installed a trigalactic refrigerator in the building and at the time of the installation the defendant agreed to pay \$5.00 additional. The subject of dispute is whether the \$5.00 to be paid each month is additional rent, or, as contended for by the plaintiff, the additional \$5.00 is a separate agreement; and to the same effect is the payment by the defendant of \$25.00 a month as rent for the garage of the plaintiff. The defendant claims that the facts in evidence show that more than 30 days before April 30, 1935, when the lease by its terms was about to expire, the defendant, on February 12, 1935, informed plaintiff's agent Stuart that he desired a new written lease for one year from the expiration date of the then lease. Stuart assured the defendant that such a lease would be prepared, which however was never done. It also appears that the defendant's wife was operated on and because of her weakened condition it would be impossible for her to live on the third floor and climb the stairs; that the defendant advised Stuart about this on the 15th day of February, 1935, and asked him for a first floor apartment; that Stuart told him that no first floor apartment was vacant, and it was then that the defendant informed Stuart it would be necessary for him to vacate the apartment on April 30, 1935; that the defendant's evidence also tends to show that the plaintiff put up a "for rent" sign on the building, and that the defendant vacated the premises on or about April 30, 1935, which facts are disputed by the plaintiff not only as to the agency of Stuart, but also as to the date of the notice of

termination, and the plaintiff's evidence is to the effect that the notice of termination was not given until the month of March 1929, less than 60 days from the end of the annual period of the lease, and that the plaintiff did not put up a sign to rent the apartment until about April 30, 1929, when it was brought to his attention that the defendant had abandoned the premises, and then only for the purpose of minimizing the damage; that the lease provides:

"To have and to hold the above described premises, with the appurtenances, unto the said lessee, from the first day of May, 1926, until the thirtieth day of April, A. D. 1928, provided sixty days written notice is given lessor by lessee of lessee's intention to terminate this lease, on said last mentioned date. Otherwise this lease, including all covenants and conditions therein, shall continue from year to year until terminated by like notice in some ensuing year."

That the notice, as provided for in the lease, must be in writing, and further that the defendant was in possession of a store room in the building until one or two days prior to the trial.

The defendant suggests that the lease which provided for a monthly rental of \$160.00 was superseded by a new agreement made in 1927, whereby the defendant undertook to and did pay a monthly rental of \$155.00; that no time was specified in this verbal agreement as to its duration, and it therefore became a lease from month to month. The answer of the plaintiff to this contention is that he managed the building himself; that the janitor had no authority, nor is there any evidence of such authority in the record whereby John Stuart could bind the plaintiff or release the defendant from the covenants of the lease, and that the plaintiff never agreed to change the rent.

It is clear from the record in this case that the plaintiff was not talked to about the preparation of a new lease, nor did the defendant give him notice of a termination of the lease.

termination, and the plaintiff's evidence is to the effect that the notice of termination was not given until the month of March 1938, less than 60 days from the end of the annual period of the lease, and that the plaintiff did not put up a sign to rent the apartment until about April 30, 1938, when it was brought to his attention that the defendant had abandoned the premises, and then only for the purpose of maintaining the damage; that the lease provided:

"To have and to hold the above described premises, with the appurtenances, unto the said lessee, from the first day of May, 1935, until the thirtieth day of April, A. D. 1938, provided sixty days written notice is given lessor by lessee of lessee's intention to terminate this lease, on said lease mentioned date. Otherwise this lease, including all covenants and conditions therein, shall continue from year to year until terminated by like notice in some ensuing year."

That the notice, as provided for in the lease, must be in writing, and further that the defendant was in possession of a store room in the building until one or two days prior to the trial.

The defendant suggests that the lease which provided for a monthly rental of \$150.00 was superseded by a new agreement made in 1935, whereby the defendant undertook to and did pay a monthly rental of \$125.00; that no time was specified in this verbal agreement as to its duration, and is therefore to become a lease from month to month. The answer of the plaintiff to this contention is that he managed the building himself; that the latter had no authority, nor is there any evidence of such authority in the record whereby legal effect could be given to the plaintiff or release the defendant from the covenants of the lease, and that the plaintiff never agreed to change the rent.

It is clear from the record in this case that the plaintiff was not asked to amend the preparation of a new lease, nor did the defendant give him notice of a termination of the lease.

The evidence in the record upon these facts is that the defendant dealt entirely with Stuart, and it is necessary to turn to the record and ascertain what position he occupied with the plaintiff.

The plaintiff testified upon cross-examination by the defendant that John Stuart is his superintendent of repairs and shows the apartments to applicants. This evidence limits the authority of Stuart and is the only evidence in the record. Certain conversations were had by the defendant with Stuart with reference to a new lease and a notice of termination of the lease, which of course could not bind the plaintiff. This evidence of the authority of the agent to act for the plaintiff was developed by the defendant on cross-examination of the plaintiff, and is as binding upon the defendant as it is upon the plaintiff, and the defendant in dealing with Stuart is charged with notice of the limited scope of his agency. The state of the record would not justify the trial court in reaching the conclusion that Stuart was the general agent of the plaintiff. Based upon the evidence which was brought to the attention of the court upon cross-examination of the plaintiff, it is clear that the agency was a limited one.

The questions other than that of agency were disputed questions of fact. The giving of notice of the termination of the lease is controverted as to whether an oral notice was given to Stuart in February or March, 1929, of which the plaintiff had knowledge, and as to whether by the oral agreement entered into when the frigidaire was installed the defendant was to pay an additional \$5.00 as rent or the amount was to be paid based upon a separate agreement; and it is further disputed as to when a "for rent" sign was attached to or placed upon the building.

The evidence in the record upon these facts is that the defendant dealt entirely with Stuart, and it is necessary to turn to the record and ascertain what position he occupied with the plaintiff.

The plaintiff testified upon cross-examination by

the defendant that John Stuart is his superintendent of repairs and shows the apartment to applicants. This evidence

limits the authority of Stuart and is the only evidence in the record. Certain conversations were had by the defendant

with Stuart with reference to a new lease and a notice of termination of the lease, which of course could not bind the

plaintiff. This evidence of the authority of the agent to act for the plaintiff was developed by the defendant on cross-

examination of the plaintiff, and is as binding upon the

defendant as it is upon the plaintiff, and the defendant in

dealing with Stuart is charged with notice of the limited

scope of his agency. The state of the record would not justify

the trial court in reaching the conclusion that Stuart was

the general agent of the plaintiff. Based upon the evidence

which was brought to the attention of the court upon cross-

examination of the plaintiff, it is clear that the agency

was a limited one.

The questions other than that of agency were dismissed

questions of fact. The issue of notice of the termination

of the lease is controverted as to whether an oral notice

was given to Stuart in February or March, 1938, which the plaintiff had knowledge, and as to whether the oral agree-

ment entered into when the trigridine was installed the

defendant was to pay an additional \$2.00 as rent or the amount

was to be paid based upon a separate agreement; and it is

further disputed as to when a "for rent" sign was set up to

or placed upon the building.

The trial court was in a better position to pass upon the credibility of the witnesses and the weight of the evidence, and this court will not interfere with the judgment unless the evidence is such that the manifest weight of the evidence is clearly against the issues upon which the judgment was entered. We cannot say that the evidence does not fairly sustain the issues for the plaintiff, and from the state of the whole evidence it is sufficient to warrant the finding for the plaintiff.

The judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The trial court was in a better position to pass upon the credibility of the witnesses and the weight of the evidence, and this court will not interfere with the judgment unless the evidence is such that the manifest weight of the evidence is clearly against the issues upon which the judgment was entered. We cannot say that the evidence does not fairly sustain the issues for the plaintiff, and from the state of the whole evidence it is sufficient to warrant the finding for the plaintiff.

The judgment is affirmed.

ATTORNEYS.

WILSON, P. J. AND FRIEND, J. CONCUR.

34126

JACOB A. LEVINSON,
Appellee,

v.

MID CITY SECURITIES CORPORATION,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 617

Opinion filed Jan. 28, 1931

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an appeal by the defendant from a judgment in a fourth class case in the Municipal Court of Chicago filed by the plaintiff against the defendant. There was a trial before a jury which resulted in a verdict for the plaintiff in the sum of \$767, upon which the court entered judgment after overruling motions for a new trial and in arrest of judgment.

Plaintiff filed an amended statement of claim alleging that he cashed a check signed by the defendant and made payable to Jacob Heller, which was endorsed by Heller and delivered to the plaintiff for valuable consideration, and that the plaintiff deposited the check in his bank, and the check was returned marked, "Payment stopped;" that the defendant is indebted to him in the sum of \$767, and that a copy of the check is attached to ^{the} amended statement of claim, to which the defendant filed an amended affidavit of merits, alleging, in substance, that the plaintiff did not take the check in good faith and for value and that he had notice of the infirmities and defects in the title of the person negotiating it; that he is not a holder of said check in due course, and further, that the check was obtained by fraud and misrepresentation on the part of the contractor, owner and subcontractor

24120

JACOB A. LEVINSKY,

Appellee.

v.

MID CITY ELECTRICITY COMPANY, INC.,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

2001 A. 315

Opinion filed Jan. 28, 1931

MR. JUSTICE KERN delivered the opinion of the court.

This is an appeal by the defendant from a judgment

in a fourth class case in the Municipal Court of Chicago filed

by the plaintiff against the defendant. There was a trial

before a jury which resulted in a verdict for the plaintiff

in the sum of \$787, upon which the court entered judgment

after overruling motions for a new trial and in arrest of

judgment.

Plaintiff filed an amended statement of claim alleging

that he cashed a check signed by the defendant and made payable

to Jacob Heller, which was endorsed by Heller and delivered

to the plaintiff for valuable consideration, and that the

plaintiff deposited the check in his bank, and the check was

returned marked, "Payment stopped;" that the defendant is in-

debted to him in the sum of \$787, and that a copy of the

check is attached to ^{the} amended statement of claim, to which the

defendant filed an amended affidavit of assets, alleging,

in substance, that the plaintiff did not take the check in

good faith and for value and that he had notice of the

infringement and defects in the title of the person negotiating

it; that he is not a holder of said check in due course, and

further, that the check was obtained by fraud and misrep-

resentation on the part of the contractor, owner and subcontractor

named as payee; that this check was issued without consideration, and that the defendant is not indebted to said plaintiff.

From the evidence it appears that the plaintiff's claim is based upon a check drawn by the defendant for the sum of \$767, dated December 15, 1937, and payable to Jacob Heller; that after Heller endorsed and delivered the check to the plaintiff he asked him to divide the check of \$767 into three parts and told him the amount that each of the persons then present was to receive; that plaintiff deducted \$120 due from Heller and gave him a check for the balance, \$132; that he also deducted \$12.44 due from L. Stokel, one of the persons present, and gave him a check for \$353, and that he gave Morris Tuchow, the third person present at the time, a check for \$249.56. These checks of the plaintiff, together with the amounts that were due to the plaintiff from Heller and Stokel, amounted to the sum of \$767, which is the amount of the check of the defendant endorsed and delivered by Heller to the plaintiff. It also appears that the plaintiff's checks issued as aforesaid were paid by the bank on which they were drawn; that the plaintiff is in the loan business, which is conducted at his home, and on the date in question plaintiff had been acquainted with Heller for a long time and had loaned him money; that he also knew Stokel, but was not acquainted with Tuchow before that time; that this transaction took place between six and seven o'clock, p.m.; that thereafter the plaintiff deposited the defendant's check on December 16, 1937, and that he was advised on the following Monday morning by his bank that the check was returned marked, "Payment stopped."

The defendant in its defense to this action introduced evidence which is, in substance, that Jacob Heller is a

known as payee; that this check was issued without consideration,

and that the defendant is not indebted to said plaintiff.

From the evidence it appears that the plaintiff's

claim is based upon a check drawn by the defendant for the

sum of \$787, dated December 18, 1937, and payable to Jacob

Heller; that after Heller endorsed and delivered the check

to the plaintiff he asked him to divide the check of \$787 into

three parts and told him the amount that each of the persons

then present was to receive; that plaintiff deducted \$100 due

from Heller and gave him a check for the balance, \$687;

that he also deducted \$12.44 due from L. Stokel, one of the

persons present, and gave him a check for \$674.56; and that he

gave Martin Tuchow, the third person present at the time, a

check for \$243.96. These checks of the plaintiff, together

with the amounts that were due to the plaintiff from Heller

and Stokel, amounted to the sum of \$787, which is the amount

of the check of the defendant endorsed and delivered by

Heller to the plaintiff. It also appears that the plaintiff's

checks issued as aforesaid were paid by the bank on which they

were drawn; that the plaintiff is in the iron business, which

is conducted at his home, and on the date in question plaintiff

had been acquainted with Heller for a long time and had loaned

him money; that he knew Stokel, but was not acquainted

with Tuchow before that time; that this transaction took place

between six and seven o'clock, p.m.; that thereafter the plain-

tiff deposited the defendant's check on December 18, 1937,

and that he was advised on the following Monday morning by

his bank that the check was returned marked, "payment stopped."

The defendant in its defense to this action intro-

duced evidence which is, in substance, that Jacob Heller is a

carpenter, and in 1927 was engaged in doing the carpenter work on a building located at Eighty-fifth street and Surley avenue, Chicago; that this building contained stores and flats and was being remodeled into a 44 room hotel above the stores; that the owner was Mrs. Clara Pines Ofner, and the general contractor was Abe Korshak, and Heller had a contract for the carpenter work.

That the Mid City Securities Corporation, the defendant, is a finance company, buying installment contracts for improvement of real estate, having regard to the mechanic's lien rights thereunder. The contracts are purchased from general contractors.

That Mrs. Ofner, on July 22, 1927, came to the defendant's office with Abe Korshak; that they at that time entered into a contract in the sum of \$18,300, payable in installments, for remodeling the premises in question, which contract was prepared on a form furnished by the defendant and signed by both Mrs. Ofner and Abe Korshak at the defendant's office; that the first maturity under said contract was on September 1, 1927.

That Trauscht, the president of the defendant company, went out in April, 1927, and inspected the property with a view to seeing whether the suggested improvement was necessary or proper for the property; that he went out again in August, 1927, after the contract was entered into, and again a few days before Thanksgiving Day, 1927; that on said last mentioned visit material progress had been made in the improvement, and it appeared to him that the work might or could be finished in a week or ten days; that he was so informed by Abe Korshak; that the subcontractors were clamoring for money, and spoke to Trauscht at the time he was at the premises; that

carpenter, and in 1937 was engaged in doing the carpenter work on a building located at Eighth-Fifth streets and Erie Avenue, Chicago; that this building contained stores and flats and was being remodelled into a 44 room hotel above the stores; that the owner was Mrs. Clara Fines Olin, and the General Contractor was Abe Korshak, and Heller had a contract for the carpenter work.

That the Mid City Securities Corporation, the defendant, is a finance company, buying installment contracts for improvement of real estate, having regard to the mechanic's lien rights thereunder. The contracts are purchased from General contractors.

That Mrs. Olin, on July 26, 1937, came to the defendant's office with the Korshak; that they at that time entered into a contract in the sum of \$15,000, payable in installments, for remodeling the premises in question, which contract was prepared on a form furnished by the defendant and signed by both Mrs. Olin and Abe Korshak at the defendant's office; that the first monthly under said contract was on September 1, 1937.

That Tinschert, the president of the defendant company, went out in April, 1937, and inspected the property with a view to seeing whether the suggested improvement was necessary or proper for the property; that he went out again in August, 1937, after the contract was entered into, and again a few days before Thanksgiving day, 1937; that on said last mentioned visit material progress had been made in the improvement, and it appeared to him that the work might or would be finished in a week or ten days; that he was so advised by Abe Korshak; that the subcontractors were clamoring for money, and spoke to Tinschert at the time he was at the premises; that

Trauscht told them, including Heller, to speed up and finish the job and they would get their money.

On December 15, 1927, Mrs. Ofner, Korshak, and an attorney named Grunewald, who represented the parties, came to the office of the Mid City Securities Corporation for the purpose of selling the contract entered into on July 22, 1927, between Mrs. Ofner and Korshak; that Trauscht was told at that time that the work called for by the contract had been completed and that they were ready to have the Mid City Securities Corporation pay out money on order; that Grunewald indicated to whom he wanted the checks drawn, including Heller, directed Mrs. Ofner to sign the completion statement, and also that both Mrs. Ofner and Korshak sign an order of the Mid City Securities Corporation to pay out the money; that at that time Korshak signed the assignment of the contract in question to the Mid City Securities Corporation; that Trauscht, relying on the oral and written statements that the work was completed, and his inspection of the premises some two weeks previously, turned the papers over to DeDiemar, the assistant treasurer of the company, with instructions to issue checks on the order of Mrs. Ofner and Korshak; that Grunewald presented waivers of liens from certain subcontractors, including Heller, and eight checks were written, seven of which were delivered to Grunewald, including the check for \$767 to Jacob Heller, on which this suit was brought.

It also appears in evidence that Grunewald and Korshak left without Mrs. Ofner and shortly thereafter she went to Grunewald's office, and while there she testified that she heard Heller, the carpenter, say that he would never finish the job, and that the work on the building had not been

Trusmont told them, including Heller, to speed up and finish

the job and they would get their money.

On December 15, 1937, Mrs. Oliver, Korschak, and an

attorney named Grunwald, who represented the parties, came

to the office of the Mid City Securities Corporation for the

purpose of selling the contract entered into on July 23, 1937,

between Mrs. Oliver and Korschak; that Trusmont was told at that

time that the work called for by the contract had been

completed and that they were ready to have the Mid City

Securities Corporation pay out money on order; that Grunwald

indicated to whom he wanted the checks drawn, including Heller,

directed Mrs. Oliver to sign the completion statement, and

also that both Mrs. Oliver and Korschak sign an order of the

Mid City Securities Corporation to pay out the money; that

at that time Korschak signed the assignment of the contract in

question to the Mid City Securities Corporation; that Trusmont,

relying on the oral and written statements that the work was

completed, and his inspection of the premises some two weeks

previously, turned the papers over to Heller, the assistant

treasurer of the company, with instructions to issue checks

on the order of Mrs. Oliver and Korschak; that Grunwald

presented waivers of liability from certain subcontractors, in-

cluding Heller, and eight checks were written, seven of which

were delivered to Grunwald, including the check for \$765 to

Jacob Heller, on which this suit was brought.

It also appears in evidence that Grunwald and

Korschak left without Mrs. Oliver and shortly thereafter she

went to Grunwald's office, and while there she testified

that she heard Heller, the treasurer, say that he would never

finish the job, and that the work on the building had not been

completed; that after remaining thirty minutes in the reception room, she went to the door of Grunewald's office and heard him tell Sidney Korshak to take the checks and have them certified; that she demanded the return of the checks, and after Korshak left Grunewald's office she went to a telephone and verified, by men on the job, that the work was not completed; that she then engaged a lawyer, Mr. Zelens, and returned with him to Grunewald's office and demanded the return of all the checks, and in the meantime Mrs. Ofner telephoned the Mid City Securities Corporation to stop payment on the check; that Heller, Korshak and one Swensly, a painter, testified for the defendant that the carpenter work was done; that Swensly said his work was not completed because he did not get his money; that Mrs. Ofner, Walter, plumbing and heating contractor on the job, and Trauscht, all testified that the carpenter work was not done; Walter testified that his work was not completed because he did not get his money.

It also appears in the record that Heller took his check for \$767 to Levinson's home, where the business with the plaintiff was transacted.

The defendant's first contention is that the verdict is contrary to the law, and that the trial court erred in entering judgment on the verdict for the reason that the check sued on was obtained by fraud and misrepresentation, and was without consideration, and complaint is made that most of the witnesses called by the defendant were hostile or at least not friendly, and that it was difficult to get any evidence from such people that might in any way benefit the defendant. The facts are for the jury, together with the credibility of the witnesses, and the jury must pass upon the weight of all the evidence in arriving at a verdict, and so far as we are able

completed; that after remaining thirty minutes in the reception room, she went to the door of Grunwald's office and heard him tell himself Grunwald to take the checks and have them certified; that she demanded the return of the checks, and after Grunwald left Grunwald's office she went to a telephone and verified by men on the job, that the work was not completed; that she then engaged a lawyer, Mr. Lelane, and returned with him to Grunwald's office and demanded the return of all the checks, and in the meantime Mrs. O'Neil telephoned the Mid City Securities Corporation to stop payment on the check; that Heller, Grunwald and one Grunwald, a painter, testified for the defendant that the carpenter work was done; that Grunwald said his work was not completed because he did not get his money; that Mrs. O'Neil, Heller, Grunwald and Heller testified on the job, and Grunwald, all testified that the carpenter work was not done; Heller testified that his work was not completed because he did not get his money.

It also appears in the record that Heller took his check for \$787 to Levinson's home, where the business with the plaintiff was transacted.

The defendant's first contention is that the verdict is contrary to the law, and that the trial court erred in entering judgment on the verdict for the reason that the check was not obtained by fraud and misrepresentation, and was without consideration, and complaint is made that none of the witnesses called by the defendant were hostile or at least not friendly, and that it was difficult to get any evidence from such people that might in any way benefit the defendant. The facts are for the jury, together with the credibility of the witnesses, and the jury must weigh the weight of all the evidence in arriving at a verdict, and so far as the

to determine from defendant's brief we find that no suggestion is made, or facts referred to, that would justify this court in reversing the judgment for the reason that it is against the manifest weight of the evidence.

Complaint is also made that the amended statement of claim of the plaintiff failed to state a cause of action in that it failed to allege that the plaintiff was a bona fide holder for value in due course before maturity. It appears from the record that the defendant filed its affidavit of merits to this action, and only raised the question of sufficiency of the statement of claim upon a motion for a directed verdict. If the statement of claim states no cause of action upon which the court could enter a judgment, the rule contended for by counsel for defendant is the law, but in referring to the plaintiff's amended statement of claim it is clear that it is based upon the check signed by the defendant for \$767, payable to the order of Jacob Heller, which was endorsed to the plaintiff for a valuable consideration, and that on the 15th day of December, 1927, the date of the check, the plaintiff cashed it and deposited it in his bank, and it was returned marked, "payment stopped." We believe that the amended statement of claim is sufficient. It apprises the defendant of the nature of plaintiff's claim; and it also appears from said statement that the plaintiff was a bona fide holder for value in due course before maturity. It is not necessary to use the exact wording of the Negotiable Instruments Act in order to bring the pleading within its terms, if it appears from the pleading that it substantially alleges facts that comply and are within the terms of this act.

The next point raised by the defendant is to the effect that the burden was on the plaintiff to prove by a pre-

to determine from defendant's trial we find that no suggestion
is made, or facts referred to, that would justify this court
in reversing the judgment for the reason that it is against
the manifest weight of the evidence.

Complaint is also made that the amended statement
of claim of the plaintiff failed to state a cause of action
in that it failed to allege that the plaintiff was a bona fide
holder for value in the course before maturity. It appears
from the record that the defendant filed its affidavit of
veritas to this action, and only raised the question of suffic-
iency of the statement of claim upon a motion for a directed
verdict. If the statement of claim states no cause of action
upon which the court could enter a judgment, the rule contended
for by counsel for defendant is the law, but in referring to
the plaintiff's amended statement of claim it is clear that
it is based upon the check signed by the defendant for 1887,
payable to the order of Jacob Heller, which was endorsed to the
plaintiff for a voluntary noninterference, and that on the 15th
day of December, 1887, the date of the check, the plaintiff
signed it and deposited it in his bank, and it was returned
marked, "payment stopped." He believes that the amended
statement of claim is sufficient. It appears the defendant of-
fers the nature of plaintiff's claim, and it also appears from said
statement that the plaintiff was a bona fide holder for value
in the course before maturity. It is not necessary to use the
exact wording of the legalistic instruments set in order to
bring the pleading within its terms, if it appears from the
pleading that it substantially alleges facts that comply and
are within the terms of this act.

The next point raised by the defendant is to the
effect that the burden was on the plaintiff to prove by a pre-

ponderance of the evidence that he took the check in question in good faith for value, and without notice of any infirmities or defect in the title of the person negotiating it after defective title of the payee was shown.

We have carefully examined the brief of the defendant, but are unable to find any evidence that would justify the court in finding that the plaintiff acted in bad faith. He cashed the check on the date the check bears, which is not disputed. There is no evidence of fraudulent conduct or knowledge of such so far as the plaintiff is concerned. All of the facts in this case are for the jury, and the plaintiff submits his cause on the evidence in the record, and this court will not reverse unless from the whole record we are of the opinion that the verdict is against the manifest weight of the evidence.

The defendant has cited Traders Investment Co. v. Kalas, 246 Ill. App. 511, as authority that plaintiff has the burden of proving he acquired title as a holder in due course. Upon an examination of the opinion it appears that the court applied the rule contended for, and the decision is to the effect that the trial court was in error in directing a verdict for the plaintiff, and in not submitting the facts to the jury. This court is in accord with the holding in that case that the plaintiff must acquire title in due course, and we are of the opinion that the jury in the instant case was justified in returning a verdict for the plaintiff.

It is insisted by the defendant that evidence of the lack of completion of the contract generally, owing to the question of fraud, misrepresentation and value of consideration, should have been admitted by the court. There is evidence in the record that the painter and plumbing and heating contractor

conductance of the evidence that he took the check in question in good faith for value, and without notice of any infirmities or defect in the title of the person negotiating it after detective title of the payee was shown.

We have carefully examined the price of the defendant, but are unable to find any evidence that would justify the court in finding that the plaintiff acted in bad faith. He cashed the check on the date the check passed, which is not disputed. There is no evidence of fraudulent conduct or knowledge of such as far as the plaintiff is concerned. All of the facts in this case are for the jury, and the plaintiff submits his cause on the evidence in the record, and this court will not reverse unless from the whole record we are of the opinion that the verdict is against the manifest weight of the evidence.

The defendant has cited Franklin Investment Co. v. Franklin, 248 Ill. App. 511, as authority that plaintiff has the burden of proving he acquired title as a holder in due course. Upon an examination of the opinion it appears that the court applied the rule contended for, and the decision is to the effect that the trial court was in error in directing a verdict for the plaintiff, and in not submitting the facts to the jury. This court is in accord with the holding in that case that the plaintiff must acquire title in due course, and we are of the opinion that the jury in the instant case was justified in returning a verdict for the plaintiff.

It is stated by the defendant that evidence of the lack of completion of the contract generally, owing to the question of fraud, misrepresentation and value of consideration, should have been admitted by the court. There is evidence in the record that the printer and plumbing and heating contractor

did not complete the work under their contracts, and it is also the evidence of witnesses that the carpenter work was not finished, notwithstanding the testimony of Heller and Swensly, who testified for the defendant that the work was completed. The only offer of proof made by the defendant was to show a failure to complete the plumbing and heating contract, which the court denied upon objection by the plaintiff. However, failure to complete such work was admitted by the witness Walter, plumbing and heating contractor on the job, and he testified for the defendant to that effect, so that the jury had these facts, and no doubt considered them in arriving at the verdict rendered in this case. The action of the court was not reversible error.

The defendant contends that instructions given to the jury by the court were erroneous, and that the following instruction does not instruct the jury as to the correct rule in regard to the burden of proof. This instruction is as follows:

"The court instructs the jury in order to defeat the right of a third person who acquires a check before it is overdue and for a valuable consideration, it is incumbent upon the defendant to show not only that it has a defense as between it and the payee in the check, but also that such third person knew of such defense or acted in bad faith.

The plaintiff in the instant case has the burden of proving by a preponderance of the evidence that he is a holder in due course and for value, and the instruction of the jury did not change this rule. It, in effect, told the jury that in order to defeat the right of a third person, the holder of a check, a defendant must show not only that it had a defense as between it and the payee in the check, but also that the holder of the check had knowledge of such defense or acted in bad faith before acquiring the check; that is, if it were

did not complete the work under their contracts, and it is also

the evidence of witnesses that the carpenter work was not finished, notwithstanding the testimony of Heller and Swenly,

who testified for the defendant that the work was completed.

The only offer of proof made by the defendant was to show a

failure to complete the plumbing and heating contract, which

the court denied upon objection by the plaintiff. However,

failure to complete such work was admitted by the witness Heller,

plumbing and heating contractor on the job, and he testified

for the defendant to that effect, so that the jury had these

facts, and no doubt considered them in arriving at the

verdict rendered in this case. The action of the court was not

reversible error.

The defendant contends that instructions given to the

jury by the court were erroneous, and that the following in-

struction does not instruct the jury as to the correct rule

in regard to the burden of proof. This instruction is as follows:

"The court instructs the jury in order to defeat the right of a third person who alleges a check before it is overdue and for a valuable consideration, it is incumbent upon the defendant to show not only that it has a defense as between it and the payee in the check, but also that such third person knew of such defense or acted in bad faith."

The plaintiff in the instant case has the burden of

proving by a preponderance of the evidence that he is a holder

in due course and for value, and the instruction of the jury

did not change this rule. If, in effect, told the jury that

in order to defeat the right of a third person, the holder of

a check, a defendant must show not only that it had a defense

as between it and the payee in the check, but also that the

holder of the check had knowledge of such defense or acted in

bad faith before acquiring the check; that is, if it were

otherwise it would be necessary for the plaintiff in this case to prove a negative, notwithstanding there is no evidence in the record offered by the defendant from which the court or jury could infer that the plaintiff had knowledge or acted in bad faith. Other objections were made to the instructions of the court, but from an examination of all of such instructions, we are unable to say that the jury was not properly instructed as to the law.

Complaint is made about the comment made by the court on the question of interest, but the court expressly stated that, "The court does not intimate that he is telling you how you should find the facts."

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

otherwise it would be necessary for the plaintiff in this case to prove a negative, notwithstanding there is no evidence in the record offered by the defendant from which the court or jury could infer that the plaintiff had knowledge or acted in bad faith. Other objections were made to the instructions of the court, but from an examination of all of such instructions we are unable to say that the jury was not properly instructed as to the law.

Complaint is made about the comment made by the court on the question of interest. But the court expressly stated that "the court does not intimate that he is telling you how you should find the facts."

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

WILSON, P. J. (MR. CHIEF JUSTICE).

6
34883

387
GEORGE FLACHAS, et al,
Appellees,

v.

FRANK PROKUPINAS, et al,

JULIA A. SWORT and JOSEPH SWORT,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

260 I.A. 617²

Opinion filed Jan. 28, 1931

MR. JUSTICE NEBEL delivered the opinion of
the court.

This is an interlocutory appeal by Julia Swort and Joseph Swort from the approval by the court of the first current report and account of the Union Bank of Chicago, receiver of the rents issues and profits of the premises described in the bill filed to foreclose two trust deeds, one for \$18,000, and one for \$9,500, both covering a public garage building in the City of Chicago, known as 6052-6054 South State street.

The receiver filed its first current report and account on September 26, 1930, to which the appellants each filed objections.

On October 6, 1930, an order was entered by the court overruling all of said objections and approving said report and account, and it is from this last interlocutory order that this appeal is prosecuted.

783

34883

INTERCOMPTON COMPANY
FROM CHICAGO COURT,
COOK COUNTY.

GEORGE B. BAKER, et al.
Appellants.

v.
FRANK PROKHIMICH, et al.
JULIA A. BROWN and JOSEPH BROWN,
Appellees.

200 I.A. 617

Opinion filed Jan. 28, 1931

MR. JUSTICE BREWER delivered the opinion of

the court.

This is an intercomptory appeal by Julia Brown and Joseph Brown from the removal by the court of the first current report and account of the Union Bank of Chicago, receiver of the bank issues and profits of the business described in the bill filed to foreclose two trust deeds, one for \$18,000, and one for \$9,500, both covering a public garage building in the city of Chicago, known as 8232-9054 South State Street.

The receiver filed its first current report and account on September 28, 1930, to which the appellants each filed objections.

On October 6, 1930, an order was entered by the court overruling all of said objections and approving said report and account, and it is from this last intercomptory order that this appeal is prosecuted.

It is contended that from the sworn report of the receiver it appears that it took actual physical possession of said premises and business and ran a garage for six months, and that the computation of said account shows it was run at a loss; that the receiver hired George Plachas, one of the complainants, to manage said business, and paid him \$440.00 for doing so, and that the said account shows various large disbursements for bond premiums, gas, oil, electricity, coal, supplies and fire insurance premiums, and also that the taking of possession of said premises and business was done without order of court authorizing the said acts and payments, which was illegal; and it was error of the court to approve said first account.

A motion was made in this court by the receiver to dismiss the appeal for the reason that it appears on the face of the record that the particular order so appealed from is an order approving the first current report and account of the said receiver and overruling objections thereto, and that such order is interlocutory and not final, and that the order settles nothing as final and does not determine any of the rights of the parties in this litigation.

The reply of the appellants to this motion is that the effect of an order approving a report covering the period of said alleged unauthorized acts and charging a loss against the real estate over the objections of the appellants is to ratify the acts and to definitely and finally dispose of that feature of the receivership and of ^{that} much of the receivership estate, and in such respect is final and brings it within the meaning of the section of the statute "giving other or further powers or property to a receiver already appointed."

It is contended that from the sworn report of the receiver it appears that it took actual physical possession of said premises and business and ran a garage for six months, and that the completion of said account shows it was run at a loss; that the receiver hired George Fischer, one of the complainants, to manage said business, and paid him \$440.00 for doing so, and that the said account shows various large disbursements for bond premiums, gas, oil, electricity, coal, supplies and fire insurance premiums, and also that the taking of possession of said premises of business was done without order of court authorizing the said sale and removal, which was illegal; and it was error of the court to approve said first account.

A motion was made in this court by the receiver to dismiss the appeal for the reason that it appears on the face of the record that the receiver acted as receiver from the date of the order appointing the first receiver until the date of the order appointing the second receiver, and that such order is interlocutory, not final, and that the order setting aside the first order is final and does not determine any of the rights of the parties in this litigation.

The reply of the appellee to this motion is that the effect of an order appointing a receiver covering the period of said alleged unauthorized acts and covering a loss and cost of the real estate over the objection of the complainants is to vest the title and to definitively and finally dispose of the estate of the receiver and of the estate of the complainants, and in such respect is final and cannot be set aside or annulled by the court of the complainants or by the court of the receiver.

Section 123 of the Practice Act, Chapter 110, Cahill's Illinois Revised Statutes, so far as it is pertinent in this proceeding, is as follows:

"Whenever an interlocutory order or decree is entered in any suit pending in any court in this state, granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court."

If the appellants have any right to appeal in this proceeding, it is because it is authorized by this statute.

The question to be considered by this court is, did the court by its order finally determine the rights of the parties in this litigation so as to bar the parties from further objecting to the approval of the final report and account of the receiver? We think not. The order of the court is to the effect that the objections filed to the receiver's report be overruled and that the current account be approved, and it does not finally adjudicate any of the rights of the parties.

It is the rule that the trial court has full power and authority when the final report of the receiver is filed to investigate and determine the correctness of all his accounts, notwithstanding a partial report had been previously approved. Standish v. Musgrove, 223 Ill. 500. As the approval of the first current account now under consideration did not, by any reasonable construction, confer other or further powers or property upon the receiver, the appeal is not authorized under the statute, and for the reasons expressed,

Section 133 of the Practice Act, Chapter 110,

Illinois Revised Statutes, so far as it is pertinent in this proceeding, is as follows:

"Whenever an interlocutory order or decree is entered in any suit pending in any court in this State, granting an injunction, or overruling a motion to dissolve the same, or entering the same as an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court."

If the appellants have any right to appeal in this proceeding, it is because it is authorized by this statute.

The question to be considered by this court is, did the court by its order finally determine the rights of the parties in this litigation so as to bar the parties from further objecting to the approval of the final report and account of the receiver? The order of the court is to the effect that the objections filed to the receiver's report be overruled and that the current account be approved, and it does not finally adjudicate any of the rights of the parties.

It is the rule that the trial court has full power and authority when the final report of the receiver is filed to investigate and determine the correctness of all his accounts, notwithstanding a partial report had been previously approved. Spaulding v. Interstate, 233 Ill. 506. As the approval of the final current account was under consideration did not, by any reasonable construction, confer either or further powers or property upon the receiver, the appeal is not authorized under the statute, and for the reasons expressed,

the motion of the receiver to dismiss said appeal is allowed.

APPEAL DISMISSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

the motion of the receiver to discontinue said appeal is
allowed.

APPEAL DISMISSED.

WILSON, P. J. AND PHILIP, J. JOHNSON.

34884

39
Filed alone February 2, 1931.

THE UNIVERSITY OF CHICAGO,
a Corporation

Appellee,

vs.

CHARLES ANDREWS et al.,
Defendants.

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT COURT
OF COOK COUNTY.

On Appeal of GEORGE PILAYAS,
Appellant.

260 I.A. 617⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by a junior mortgagee from an order appointing a receiver in a foreclosure proceeding brought by the University of Chicago, complainant. Neither the mortgager nor the present owner of the equity questions the appointment.

The bill of complaint was filed October 23, 1930, and thereafter on October 30, upon a verified petition, the receiver was appointed. Subsequently, on November 29th, the junior mortgagee filed his appeal bond and brings the record to this court with an assignment of errors.

In this court the complainant (appellee) filed certain pleas, asserting release of errors. To these the appellant filed a demurrer. Briefs have been filed in support of the pleas and in support of the demurrer. The pleas set forth matters which it is argued show an acquiescence in the appointment of the receiver and conduct of the appellant which estops him from questioning the validity of the appointment.

The first plea recites the filing of the bill and personal service on the appellant, requiring him to appear November 17; that no appearance nor answer was filed on his behalf and, being then in default, through his solicitors he requested complainant to stipulate that his appearance and answer might be filed instantly and the receivership herein be extended

Filed alone February 5, 1931.

34884

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT COURT
OF COOK COUNTY.

THE UNIVERSITY OF CHICAGO,
a Corporation,
Appellee,

vs.
CHARLES WILSON et al.,
Defendants.

On Appeal of GEORGE WILLIAMS,
Appellant.

2001A.617

MR. JUSTICE McKENNEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by a junior mortgagee

from an order appointing a receiver in a foreclosure proceeding
brought by the University of Chicago, complainant. Neither the
mortgagee nor the present owner of the equity questions the ap-
pointment.

The bill of complaint was filed October 23, 1929, and
thereafter on October 30, upon a verified petition, the receiver
was appointed. Subsequently, on November 28th, the junior mort-
gagee filed his appeal bond and brings the record to this court
with an assignment of errors.

In this court the complainant (appellee) filed cer-
tain pleas, asserting release of errors. To these the appellant
filed a demurrer. Briefs have been filed in support of the pleas
and in support of the demurrer. The plea set forth matters which
it is urged show an acquiescence in the appointment of the re-
ceiver and conduct of the appellant which escape him from ques-
tioning the validity of the appointment.

The first plea recites the filing of the bill and
personal service on the appellant, requiring him to appear
November 17; that no appearance nor answer was filed on his
behalf and, being then in default, through his solicitors he
requested complainant to stipulate that his appearance and answer
might be filed instantly and the receivership herein be extended

to a prior foreclosure proceeding brought by appellant to foreclose his junior trust deed and in which no receiver had been appointed. That thereupon it was stipulated in writing that the appellant might file his appearance and answer instantly, and on December 1 he served notice upon the complainant to the effect that he would on December 2 ask for the entry of an order extending the receivership to his foreclosure proceeding pending in the Circuit court. The pleas set forth the notice and also that appellant requested complainant to consent to such extension of said receivership and to approve an order accomplishing same, to which complainant agreed; that thereupon the order extending the receivership was entered, having received the written approval of the attorneys for complainant. The order sets forth and recites the pendency of the foreclosure proceedings to foreclose the junior trust deed; that the owner of the equity of redemption is a non-resident of Illinois and cannot be found and upon due and diligent inquiry his place of residence cannot be ascertained and due notice of the proposed entry of this order has been given to all solicitors of record and that the benefits of said receivership should be extended to such cause and it was therefore ordered that upon the filing of a bond by the junior mortgagee the receivership should be and the same was thereby extended for the protection of said mortgagee and should cover and include the lien of the notes and junior trust deed securing the same "to like effect as though said extension was an original appointment of a receiver therein; and that in all other respects the receivership herein shall continue in full force and effect."

By a further plea it was set forth that on December 16, 1930, which was after the appeal bond herein had been filed, both appellant and complainant agreed in writing to an order that the receiver should pay the janitor on account of work and labor and

to a later date, the proceeding brought by appellant to foreclose his junior trust deed and in which no receiver had been appointed. That therefore it was stipulated in writing that the appellant might file his appearance and answer instantly, and on December 1 he served notice upon the complainant to the effect that he would on December 2 ask for the entry of an order extending the receivership to his foreclosure proceeding pending in the Circuit Court. The plea set forth the notice and also that appellant requested complainant to consent to such extension of said receivership and to approve an order accompanying same, to which complainant agreed; that thereupon the order extending the receivership was entered, having received the written approval of the attorneys for complainant. The order sets forth and recites the pendency of the foreclosure proceedings to foreclose the junior trust deed; that the owner of the equity of redemption is a non-resident of Illinois and cannot be found and upon due and diligent inquiry his place of residence cannot be ascertained and due notice of the proposed entry of this order has been given to all solicitors of record and that the benefits of said receivership should be extended to such cause and it was therefore ordered that upon the filing of a bond by the junior mortgagee the receivership should be and the same was thereby extended for the protection of said mortgagee and should cover and include the lien of the notes and junior trust deed securing the same "to like effect as though said extension was an original appointment of a receiver therein; and that in all other respects the receivership herein shall continue in full force and effect."

By a further plea it was set forth that on December 10, 1930, which was after the appeal bond herein had been filed, but appellant and complainant agreed in writing to an order that the receiver should pay the junior on account of work and labor and

certain other bills for expenses incurred in the operation of the premises and also an item of \$150 to make repairs on the roof. The plea asserted that by procuring said orders the appellant accepted the benefits of the order of October 23 and that such acceptance was an estoppel and release of any errors in the appointment and that by consenting to the entry of the order in reference to the repairs the appellant recognized the appointment of the receiver as rightfully made and was estopped to declare that the receiver was not lawfully appointed.

The fourth plea sets forth at some length matters outside the record which are, in substance, that the solicitors for the junior mortgagee after the bill was filed to foreclose that mortgage advised the attorneys for complainant that, if it brought proceedings to foreclose its mortgage and asked that a receiver be appointed therein, the junior mortgagee would not ask for a separate receiver and that the complainant's solicitor thereupon advised the solicitors for the junior mortgagee that a bill to foreclose the trust deed would be filed shortly and that application for a receiver would be made promptly and that thereupon such a bill was prepared and filed and appellee's solicitors notified the junior mortgagee's solicitors that the bill had been filed and application for a receiver would be made, and that the solicitors for the junior mortgagee requested complainant's solicitors to make application for the appointment of a receiver at the earliest possible moment, advising that the maker of the trust deed and notes described in the bill of complaint was interfering with the tenants and that the premises were in immediate need of coal and repairs; that there were further consultations between respective counsel and when the complainant secured the appointment of the receiver the solicitors for the junior mortgagee expressed their satisfaction over the appointment and that at no time until after the appeal

certain other bills for expenses incurred in the operation of the premises and also an item of \$150 to make repairs on the roof. The plan asserted that by procuring said orders the appellant accepted the benefits of the order of October 23 and that such acceptance was an estoppel and release of any errors in the appointment and that by consenting to the entry of the order in reference to the repairs the appellant recognized the appointment of the receiver as rightfully made and was estopped to declare that the receiver was not lawfully appointed.

The fourth plea sets forth at some length matters outside the record which are, in substance, that the solicitors for the junior mortgage after the bill was filed to foreclose that mortgage advised the attorneys for complainant that, if it brought proceeds into the foreclose the mortgage and asked that a receiver be appointed therein, the junior mortgage would not act for a separate receiver and that the complainant's solicitor thereupon advised the solicitor for the junior mortgage that a bill to foreclose the trust deed would be filed shortly and that application for a receiver would be made promptly and that thereupon such a bill was prepared and filed and appellee's solicitors notified the junior mortgage's solicitors that the bill had been filed and application for a receiver would be made, and that the solicitors for the junior mortgage requested complainant's solicitors to make application for the appointment of a receiver at the earliest possible moment, advising that the maker of the trust deed and notes described in the bill of complaint was interfering with the tenants and that the premises were in immediate need of coal and repairs; that there were further consultations between respective counsel and when the complainant secured the appointment of the receiver the solicitors for the junior mortgage expressed their satisfaction over the appointment and that at no time until after the appeal

bond was filed did they advise solicitors or their clients that they disapproved of said appointment.

Appellant demurred to these pleas, asserting that they were not sufficient in law or equity to bar appellant from maintaining this appeal.

We are of the opinion that the pleas were sufficient and that the demurrer should be overruled. When the junior mortgagee asked for and obtained the benefit of the order appointing the receiver here and consented that this receivership should continue in full force and effect, he was thereby estopped from now questioning the validity of said order. It is an accepted rule that, whenever a party to a decree accepts the benefits thereof, such acceptance constitutes a release of errors and he will not afterwards be heard to allege errors for the purpose of securing a reversal of the decree. It was so held in Gridley v. Wood, 305 Ill. 376, and cases there cited. In National Castings Co. v. Steel Co., 333 Ill. 588, the court said:

"A party may acquiesce in an erroneous decision, and if he does so he has no cause to complain."

To the same effect are: Schaeffer v. Ardery, 238 Ill. 557; Chaney v. Baker, 302 Ill. 481; Vishburn v. Green, 291 Ill. 350. In Trapp v. Off, 194 Ill. 287, quoting from Thomas v. Negus, 2 Gilm. 700, it was said:

"A party ought not to receive the benefit of a decree and then complain that it is erroneous. If dissatisfied with it, he should abstain from doing any act, which may change the situation, or impair the right of the parties, in the event of its reversal."

To the same effect are Kellner v. Schmidt, 237 Ill. App. 428; Cooper v. Handelsman, 247 Ill. App. 454; Reardon v. Youngquist, 189 Ill. App. 3. In Lyman v. Kansas City & A. R. Co., 101 Fed. 636, the court in holding that, where one acquiesces and accepts the benefit of the reorganization involved, he should not upon principles

had we filed it they advise solicitors or their clients that they disapproved of said appointment.

Appellant assumed to these plans, asserting that they were not sufficient in law or equity to bar appellant from maintaining this appeal.

He set of the opinion that the plans were null and void and that the same should be overturned. When the junior mortgages were made and obtained the benefit of the order appointing the receiver here and consented that this receivership should continue in full force and effect, he was thereby estopped from now questioning the validity of said order. It is an accepted rule that whenever a party to a decree accepts the benefits thereof, such acceptance constitutes a release of errors and he will not afterwards be heard to allege errors for the purpose of securing a reversal of the decree. It was so held in Griffey v. Wood, 305 Ill. 376, and cases there cited. In National Castles Co. v. Steel, 308 Ill. 588, the court said:

"A party may acquiesce in an erroneous decision, and if he does so he has no cause to complain."

To the same effect are: Chapman v. Alder, 328 Ill. 557; Chapman v. Baker, 302 Ill. 481; Wichman v. Green, 321 Ill. 380. In Trapp v. Ott, 194 Ill. 287, quoting from Thomas v. Burns, 2 Ill. 700, it was said:

"A party ought not to receive the benefit of a decree and then complain that it is erroneous. If dissatisfied with it, he should abstain from doing any act, which may change the situation, or impair the right of the parties, in the event of its reversal."

To the same effect are Kelner v. Schmidt, 324 Ill. App. 458; Cooper v. Handelman, 347 Ill. App. 484; Reagan v. Yonkers, 193 Ill. App. 3. In Lawson v. Kansas City & A. R. Co., 101 Ind. 636, the court is holding that, where one acquiesces and accepts the benefits of the transaction involved, he should not upon principles

of common right, equity and good conscience question the validity of the proceedings, saying:

"It therefore comes without grace for him to point out the freckles, warts and ugly features of the child of his adoption."

Appellant seems to base his argument upon the proposition that he was compelled to ask for an order extending the receivership to cover his foreclosure, as another court of co-ordinate jurisdiction would not entertain a motion for the appointment of his own receiver in view of the appointment already made, and argues from this that his conduct did not amount to an acquiescence in the validity of the appointment. We think this argument is based upon an erroneous premise. A receivership is not for the benefit of any particular party. It is the means whereby the court takes possession of the property for the benefit of all parties as their interests may appear. Its appointment is for the protection of the property during the litigation and for its operation, if necessary, so as to produce income. All parties would receive benefits from the receivership.

If the junior mortgagee was of the opinion that the appointment of the receiver in the first instance was invalid, he could have appealed therefrom without accepting any of the benefits of such receivership; but he elected to accept the benefits and at the same time appeal from the order appointing such receiver. The case calls for the application of the rule above stated that, having accepted the benefits of the receivership he cannot be heard to question the appointment by this appeal.

The same rule applies to the consent of the junior mortgagee to the order providing for the payment by the receiver of substantial sums for the improvement and operation of the premises in question. In Reby v. Title Guarantee & Trust Co., 166

of common right, equity and good conscience question the validity

of the proceedings, saying:

"If therefore comes without ground for him to point out the
fraud, waste and mismanagement of the will of his
deceased."

Appellant seems to base his argument upon the proposi-

tion that he was compelled to ask for an order extending the re-
ceiver's powers to cover his investments, as another court of co-ordinate

jurisdiction would not entertain a motion for the appointment of
his own receiver in view of the appointment already made, and argues
from this that his conduct did not amount to an acknowledgment in the
validity of the appointment. We think this argument is based upon

an erroneous premise. A receivership is not for the benefit of

any particular party. It is the means whereby the court takes
possession of the property for the benefit of all parties as their

interest may appear. Its appointment is for the protection of

the property during the litigation and for its operation, it neces-
sarily, so as to produce income. All parties would receive benefits

from the receivership.

If the junior mortgage was of the opinion that the

appointment of the receiver in the first instance was invalid, he
could have appealed therefrom without accepting any of the benefits
of such receivership; but he elected to accept the benefits and as
the same time annul the order appointing such receiver.

The case calls for the application of the rule above stated that,
having accepted the benefits of the receivership he cannot be heard
to question the appointment by this appeal.

The same rule applies to the consent of the junior

mortgagee to the order providing for the payment by the receiver

of substantial sums for the improvement and operation of the

premises in question. - Hoby v. Little, Greenleaf & Trust Co., 102

Ill. 336, the court said that the complaining party:

"Recognized the capacity of the acting corporation by consenting to an order providing for the advancement of money by it to protect the estate in its possession as receiver. The money was advanced, and he is now estopped from claiming that the receiver was not lawfully appointed or competent to act."

As to the last plea, it asserts facts to the effect that the appointment of the receiver was not only by agreement of respective solicitors, but at the urgent request of the solicitors for the junior mortgagee. The appointment having been obtained by their request, the junior mortgagee should not now be heard to question its validity.

We hold that the pleas were sufficient in law and equity to bar appellant from prosecuting this appeal, and the demurrers to each and all of said pleas are overruled.

DEMURRERS OVERRULED.

Matchett, P. J., and O'Connor, J., concur.

111. 336, the court said that the complaining party:

"Recognized the capacity of the acting corporation by consenting to an order providing for the advancement of money by it to pre-
lent the estate in its possession as receiver. The money was
advanced, and he is now estopped from claiming that the receiver
was not lawfully appointed or competent to act."

As to the last plea, it asserts facts to the effect

that the appointment of the receiver was not only by agreement of
respective creditors, but at the urgent request of the creditors
for the junior mortgage. The appointment having been obtained by
their request, the junior mortgage should not now be heard to

question its validity.

It is said that the plea was sufficient in law and

ought to not require them to prosecute this appeal, and the

demurrers to each and all of said pleas are overruled.

RECEIVED OVERSIGHT.

March 22, 1900, and O'Connor, J., concur.

34666

43
E. H. BROWN, Doing Business as E. H.
BROWN ADVERTISING AGENCY and as
RADIO ADVERTISING SYSTEM,
Appellee,

vs.

BENJAMIN D. RITHOLZ, Doing Business
as RITZ OPTICAL COMPANY,
Appellant.

7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

260 I.A. 617⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of plaintiff in the sum of \$605.87 entered upon the finding of the court. The statement of claim disclosed a demand to the amount for which judgment was rendered by reason of an alleged contract for advertising work and labor in the form of radio broadcastings furnished by plaintiff from December 12, 1929, to and including February 13, 1930. The affidavit of merits denied the indebtedness in any amount; averred that defendant did not at any time have an open account contract for advertising work and labor; denied that plaintiff furnished any work and labor in the form of radio advertising from December 12, 1929, to and including February 13, 1930, at the request of defendant.

Upon the trial plaintiff offered in evidence a purported contract in writing between plaintiff and defendant, which plaintiff testified was mailed to defendant on November 7, 1929. Plaintiff further testified that when this contract was returned it was changed in two respects - (1) a notation appeared upon it to the effect that it "must be completed by November 19th" and (2) the word "minimum," which appeared thereon limiting the amount of expenditures, was stricken out and the word "maximum" substituted therefor. Plaintiff testified that upon the receipt of the contract as changed he called up defendant immediately and told him, in

E. R. BROWN, Being Business as W. H.
BROWN ADVANTAGING AGENCY and as
RADIO ADVERTISING SYSTEM,
Appellee.

vs.

BENJAMIN B. WILKINS, Being Business
as RITE OPTICAL COMPANY,
Appellant.

COURT OF CHICAGO.
APPEAL FROM MUNICIPAL

200 I.A. 617

MR. PRESIDING JUSTICE WATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of plaintiff in the sum of \$600.00 entered upon the finding of the court. The statement of claim disclosed a demand to the amount for which judgment was rendered by reason of an alleged contract for advertising work and labor in the form of radio broadcastings furnished by plaintiff from December 12, 1934, to and including February 12, 1935. The affidavit of merits denied the indebtedness in any amount; averred that defendant did not at any time have an open account contract for advertising work and labor; denied that plaintiff furnished any work and labor in the form of radio advertising from December 12, 1934, to and including February 12, 1935, at the request of defendant.

Upon the trial plaintiff offered in evidence a purported contract in writing between plaintiff and defendant, which plaintiff testified was mailed to defendant on November 7, 1934. Plaintiff further testified that when this contract was returned it was changed in two respects - (1) a notation appeared upon it to the effect that it "must be completed by November 12th" and (2) the word "minimum," which appeared thereon listing the amount of expenditures, was stricken out and the word "maximum" substituted therefor. Plaintiff testified that upon the receipt of the contract he changed up defendant immediately and told him, in

substance, that it was impossible to change the contract in these respects and that defendant said, "It is entirely in your hands," and "I want results;" that thereupon plaintiff struck out these changes.

Defendant testified denying generally that he authorized the elimination of these changes, and said that they were made "without my permission or authority." He admitted that plaintiff asked for authority to strike out the changes, but testified that he, defendant, said "Absolutely not, take it or leave it," and that plaintiff then said, "I will take it."

Defendant has urged a number of propositions of law and cited authorities to sustain them, to the effect that an acceptance of a proposition with a modification constitutes in law a rejection of it; that the substitution of a new proposition by one in order to constitute a contract must itself be accepted by the other party, and that the acceptance must conform exactly to the offer; that the burden of proving the ratification of an altered instrument is upon the party offering the instrument; that a contract partly in writing and partly oral is in law an oral contract; that performance under a contract must be identical with the terms thereof. There is no question about these propositions nor of the further proposition urged that the burden of proof is upon the plaintiff to prove his case by a preponderance of the evidence.

Defendant also urges the proposition that "parol evidence is inadmissible to vary the terms of a written instrument," which is not an exact statement of the rule, the general rule being that oral contemporaneous evidence is inadmissible for such purpose. The oral evidence in this case was not admitted for the purpose of varying the terms of the written contract, but for the purpose of identifying the real contract between the parties.

substance, that it was impossible to change the contract in these respects and that defendant said, "it is entirely in your hands," and "I want results;" that defendant plaintiff struck out these changes.

Defendant testified denying generally that he authorized the elimination of these changes, and said that they were made "without my permission or authority." He admitted that plaintiff asked for authority to strike out the changes, but testified that he, defendant, said "Absolutely not, take it or leave it," and that plaintiff then said, "I will take it."

Defendant has urged a number of propositions of law and cited authorities to sustain them, to the effect that on acceptance of a proposition with a modification constituted in law a rejection of it; that the substitution of a new proposition by one in order to constitute a contract must itself be accepted by the other party, and that the acceptance must contain exactly to the effect; that the burden of proving the rejection of an altered instrument is upon the party offering the instrument; that a contract partly in writing and partly oral is in law an oral contract; that performance under a contract must be identical with the terms thereof. There is no question about these propositions nor of the further proposition urged that the burden of proof is upon the plaintiff to prove he gave by a promissory note of the evidence.

Defendant also urges the proposition that "oral evidence is inadmissible to vary the terms of a written instrument," which is not an exact statement of the rule, the general rule being that oral ~~extrinsic~~ evidence is inadmissible for such purpose. The oral evidence in this case was not admitted for the purpose of varying the terms of the written contract, but for the purpose of identifying the real contract between the parties.

Indeed, the controversy between the parties here is on an issue of fact arising out of the conflicting testimony given by plaintiff and defendant. The finding of the court on this issue is entitled to the same weight upon review by this tribunal as that of the verdict of a jury, and we are not able to say that the finding of the court is manifestly against the weight of the evidence. The trial court had opportunities in seeing the witnesses and hearing them testify which gave a decided advantage in that respect.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

Indeed, the controversy between the parties here is on an issue of fact arising out of the conflicting testimony given by plaintiff and defendant. The finding of the court on this issue is entitled to the same weight upon review by this tribunal as that of the verdict of a jury, and we are not able to say that the finding of the court is manifestly against the weight of the evidence. The trial court had opportunities in seeing the witnesses and hearing their testimony which gave a decided advantage in that respect. For the reasons indicated the judgment is affirmed.

REVEREND.

O'Connell and Kennedy, JJ., concur.

34678

H. J. GOTTSCHALK,
Appellee,

vs.

TILLIE RICE and ADELBERT RICE,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 618

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of \$965 entered upon the verdict of a jury. The action was for a balance claimed to be due for commissions earned by plaintiff as a real estate broker, and the statement of claim alleged a stated account concerning the same. The claim was verified by the affidavit of plaintiff in conformity with the rules of the Municipal court and with the statute.

The affidavit of merits was verified by the defendant, Adelbert Rice, who stated that he was authorized to make the same also in behalf of defendant Tillie Rice. The affidavit denied that plaintiff was a licensed broker, denied that defendants were indebted and averred that defendants entered into a written contract with plaintiff, a copy of which was attached to the affidavit of merits and made a part of it. The affidavit further averred that at the time of making said contract, September 6, 1928, Adelbert Rice delivered his check for \$375 to plaintiff in full settlement.

This alleged written agreement is signed by Adelbert Rice alone, and it states in substance that it is agreed with reference to the Rice-Ulrich real estate deal, on which plaintiff claims commission, that \$375 is to be paid at the close of the deal and that "I hereby agree to give you an option on residence 315 Cumberland Ave. with the understanding said option is for 6 months from date, anything the Park Ridge sells for over and above \$10,800 is to be divided equally between you and I after all expenses have been

H. J. COTTRELL,
Appellee.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

TILLIE RICE and ADALBERT RICE,
Appellants.

200 I.A. 618

MR. PRESIDING JUSTICE KATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of \$375 entered upon the verdict of a jury. The action was for a balance claimed to be due for commissions earned by plaintiff as a real estate broker, and the statement of claim alleged a stated account concerning the same. The claim was verified by the affidavit of plaintiff in conformity with the rules of the Municipal Court and with the statute.

The affidavit of writs was verified by the defendant, Adalbert Rice, who stated that he was authorized to make the same also in behalf of defendant Tillie Rice. The affidavit denied that plaintiff was a licensed broker, denied that defendants were indebted and averred that defendants entered into a written contract with plaintiff, a copy of which was attached to the affidavit of writs and made a part of it. The affidavit further averred that at the time of making said contract, September 6, 1928, Adalbert Rice delivered his check for \$375 to plaintiff in full settlement.

This alleged written agreement is signed by Adalbert Rice alone, and it states in substance that it is agreed with reference to the Rice-Rice real estate deal, on which plaintiff claims commission, that \$375 is to be paid at the close of the deal and

that "I hereby agree to give you an option on residence 315 Campbell land Ave. with the understanding said option is for 6 months from date, anything the Park Ridge sells for over and above \$10,000 is to be divided equally between you and I after all expenses have been

deducted. This option expires March 6, 1929. Yours truly, Adelbert Rice." The instrument is not signed by plaintiff nor by defendant Tillie Rice.

It is contended in the first place that the court erred in entering a joint judgment against Adelbert and Tillie Rice, although the affidavit of merits did not deny their joint liability. Defendants cite to this point United Workmen v. Zuehlke, 129 Ill. 298; Imperial Hotel Co. v. Claflin Co., 175 Ill. 119, and a number of other cases which hold that in an action in assumpsit where recovery is sought against several defendants, even if the joint liability is not put in issue by plea in bar or abatement, a judgment will not be sustained where the evidence affirmatively shows that the defendants were not jointly liable. These cases have no application to facts such as appear here. The joint liability of defendants was averred in the amended statement of claim. It was by inference admitted by the affidavit of merits. We are required by statute to take judicial notice of the rules of the Municipal court of Chicago. Smith-Hurd Ill. Rev. Stat., chap. 51, par. 48 (b). Rule 15 of the Municipal court provides:

"Every allegation of fact in any pleading, except allegations of unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted."

And such is the law irrespective of the rule. Cooper v. Anderson, 246 Ill. App. 1. The rule, of course, would not be applicable, as already stated, where the proof affirmatively shows no joint liability; but that is not the case here. On the contrary, joint liability is averred, is not denied, is by implication admitted, and is established by sufficient prima facie evidence.

The facts are uncontradicted that Tillie Rice is the wife of Adelbert Rice; that she was the owner of the real estate concerning which the exchange contract was made with Ulrich. This

deducted. This option expires March 6, 1932. Yours truly, Adelbert
Nise. The instrument is not signed by plaintiff nor by defendant
Willie Nise.

It is contended in the first place that the court erred
in entering a joint judgment against Adelbert and Willie Nise,
although the affidavit of service did not deny their joint liability.
Defendants cite to this point United Western v. Wankler, 130 Ill.
228; Imperial Hotel Co. v. Glavin Co., 175 Ill. 119, and a number
of other cases which hold that in an action in assumpsit there re-
covery is sought against several defendants, even if the joint li-
ability is not put in issue by plea. In bar of abatement, a judg-
ment will not be sustained where the evidence affirmatively shows
that the defendants were not jointly liable. These cases have no
application to facts such as appear here. The joint liability of
defendants was averred in the amended statement of claim. It was
by inference admitted by the affidavit of service. We are relieved
by statute to take judicial notice of the rules of the Municipal
Court of Chicago. Section 111, Chap. 61, par. 48
(b). Rule 12 of the Municipal Court provides:

"Every allegation of fact in any pleading, except allega-
tions of undoubted matters, if not denied specifically or by
necessary implication in the pleading of the opposite party,
shall be taken to be admitted."

And such is the law irrespective of the rule. Conner v. Anderson,
246 Ill. App. 1. The rule, of course, would not be applicable, as
already stated, where the proof affirmatively shows no joint li-
ability; but that is not the case here. On the contrary, joint
liability is averred, is not denied, is by implication admitted,
and is established by sufficient prima facie evidence.

The facts are undisputed that Willie Nise is the
wife of Adelbert Nise; that she was the owner of the real estate
concerning which the exchange contract was made with Glavin. This

exchange contract is in writing and under seal, was entered into September 6, 1928, and was signed by August F. Ulrich, Josephine Ulrich, Tillie Rice and Adelbert Rice. The signature of Tillie Rice is by "A. Rice." This writing states that plaintiff is the broker; that the agreement as to commission is "Chicago Real Estate Board Rate for improved property." The evidence is uncontradicted to the effect that pursuant to the contract Tillie Rice joined her husband in conveying the property. These facts are sufficient to establish a joint liability.

Defendants next argue that the court erred in admitting over objection of defendant a copy of rules stating the commission rates of the Chicago Real Estate Board. The document was produced by a witness, Edwin J. Johnson, who testified that he had been a real estate broker for eighteen years and was familiar with rates for the sale and exchange of property; that the document offered was a copy of the rules and rates of the Board, and that he had received it from the Board. Defendants objected on the ground that it was not certified, that it had no bearing on the case and that no proper foundation had been laid for its introduction. The objection was overruled.

The witness further testified that the commission was five per cent on the first \$10,000 and three per cent on all above that amount. He also testified as to the right of a broker who acted for both parties to a transaction, saying that in such case the broker would receive a commission from both parties according to the rules of the Real Estate Board. In all these matters the witness testified as an expert, and there was no objection on the ground of his qualifications. Adelbert Rice himself testified to the same effect, substantially, with reference to the usual charges of the Real Estate Board. The paper offered was therefore only cumulative evidence concerning facts which were not denied by the

exchange contract is in writing and under seal, was entered into September 6, 1933, and was signed by August T. Ulich, Josephine Ulich, Willie Rice and Adalbert Rice. The signature of Willie Rice is by "A. Rice." This writing states that plaintiff is the broker; that the agreement is to commission as "Chicago Real Estate Board Rate for improved property." The evidence is uncontradicted to the effect that pursuant to the contract Willie Rice joined her husband in conveying the property. These facts are sufficient to establish a joint liability.

Defendants next argue that the court erred in admitting over objection of defendant a copy of rules stating the commission rates of the Chicago Real Estate Board. The document was produced by a witness, Edwin J. Johnson, who testified that he had been a real estate broker for eighteen years and was familiar with rules for the sale and exchange of property; that the document offered was a copy of the rules and rates of the Board, and that he had received it from the Board. Defendants objected on the ground that it was not certified, that it had no bearing on the case and that no proper foundation had been laid for its introduction. The objection was overruled.

The witness further testified that the commission was five per cent on the first \$10,000 and three per cent on all above that amount. He also testified as to the right of a broker who acted for both parties to a transaction, saying that in such case the broker would receive a commission from both parties according to the rules of the Real Estate Board. In all these matters the witness testified as an expert, and there was no objection on the ground of his qualifications. Adalbert Rice himself testified to the same effect, substantially, with reference to the usual charges of the Real Estate Board. The paper offered was therefore only cumulative evidence concerning facts which were not denied by the

affidavit of merits and were established without contradiction by evidence produced by both of the parties. Even if the contention is granted that a proper foundation was not laid for the introduction of the document under these circumstances, the ruling would not constitute reversible error.

Defendants also complain of an instruction given by the court which is described in the abstract as the second instruction, although the record shows that according to the practice of the Municipal court, the court instructed the jury orally. That part of the instruction complained of is, as follows:

"The court instructs the jury that if you find from the evidence that the plaintiff had in view a possible customer for defendant's property, and the defendant agreed that if the plaintiff would act as his broker in attempting to effect a sale of said property at an agreed price to said prospective purchaser and that if said person should thereafter become a purchaser of said property from defendant, that defendant would pay to plaintiff for its services the Chicago Real Estate Board rate of commission, and if you further believe from the evidence that thereafter plaintiff acted as defendant's broker in affecting a sale or exchange of said property at a price of \$38,000.00 and that thereafter such sale or exchange was consummated, then you are instructed that the plaintiff is entitled to a verdict for \$1340.00, less any amount plaintiff received on account thereof."

Upon the court so instructing, the attorney for defendants stated, "I object to the second instruction, if the court please," and that is the only objection made so far as the instructions are concerned. Rule 8 of the Municipal court provides:

"Objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire."

Defendants complain that this instruction as given disregarded the defense offered by them and at the same time instructed a verdict. That specific objection was not, however, made as required by the rule of the court. Moreover, defendants have abstracted only a portion of the instructions, so we are not able to say from the record before us that the alleged error was not cured by some other part of the oral instructions given by the court.

affidavit of merit and were established without contradiction by evidence produced by both of the parties. Even if the contention is granted that a proper foundation was not laid for the introduction of the document under these circumstances, the ruling would not constitute reversible error.

Defendants also complain of an instruction given by the court which is described in the abstract as the second instruction, although the record shows that according to the practice of the Municipal Court, the court instructed the jury orally. That part of the instruction complained of is, as follows:

"The court instructs the jury that if you find from the evidence that the plaintiff had in view a possible customer for defendant's property, and the defendant agreed that if the plaintiff would act as his broker in attempting to effect a sale of said property at an agreed price to said prospective purchaser and that it said person should thereafter become a purchaser of said property from defendant, that defendant would pay to plaintiff for its services the Chicago Real Estate Board rate of commission, and if you further believe from the evidence that there after plaintiff acted as defendant's broker in effecting a sale or exchange of said property at a price of \$38,000.00 and that thereafter such sale or exchange was consummated, then you are instructed that the plaintiff is entitled to a verdict for \$1340.00, less any amount plaintiff received on account thereof."

Upon the court so instructing, the attorney for defendant stated, "I object to the second instruction, if the court please," and that is the only objection made so far as the instructions are concerned. Rule 8 of the Municipal Court provides: "Objections to the giving or refusing of oral instructions to the jury must be specifically and must be made immediately upon the conclusion of the charge and before the jury retires."

Defendants complain that this instruction as given disregarded the defense offered by them and at the same time instructed a verdict. That specific objection was not, however, made as required by the rule of the court. Moreover, defendants have abstracted only a portion of the instructions, so we are not able to say from the record before us that the alleged error was not cured by some other part of the oral instructions given by the court.

There have been two trials of this cause and the litigation should end. The option defense set up in the amended affidavit was apparently an afterthought and without real merit.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Conner and McSurely, JJ., concur.

There have been two trials of this case and the litigation should
end. The option defense set up in the amended affidavit was up-
held. The option defense was without merit.
The judgment of the trial court is affirmed.

UNRECORDED.

O'Connor and Kennedy, Pl., counsel.

34696

MINNIE C. BUTTS,
Appellee,

vs.

C. A. ERICKSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 618²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Erickson from a judgment in favor of the plaintiff entered upon the finding of the court in an action for forcible entry and detainer.

It is urged for reversal that the finding and the judgment are against the weight of the evidence; that the court refused to admit competent and material evidence offered by defendant, and that the judgment is against the law.

The complaint, filed July 21, 1930, alleged that the plaintiff was entitled to the possession of premises in the City of Chicago described as:

"The flats (that is the three floors) above the stores commonly known as #851-853-855-857 North Clark street, and the middle and top floors above the store known as 849 North Clark street, in said building, and sufficient basement room for steam plant; also coal room storage under sidewalk and in basement."

Upon trial plaintiff introduced in evidence a lease of the premises in writing dated December 6, 1922, whereby she demised to defendant the premises described for a term beginning May 1, 1923, to April 30, 1933, for a monthly rental therein reserved. The 12th paragraph of the lease provided that if default was made in the payment of rent it should be lawful for the lessor at her election, without notice, to declare the term ended and to re-enter, etc.

Plaintiff also testified that her son, Joseph C. Butts, had charge of the premises for her; and Joseph testified that defendant had not paid rent for the months of May, June and July, 1930;

MINNIE C. BUTTS,
Appellee.
vs.
O. A. ERICKSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2001.A.618

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Erickson from a judgment in favor of the plaintiff entered upon the finding of the court in an action for forcible entry and detainer. It is urged for reversal that the finding and the judgment are against the weight of the evidence; that the court refused to admit competent and material evidence offered by defendant, and that the judgment is against the law. The complaint, filed July 31, 1932, alleged that the plaintiff was entitled to the possession of premises in the City of Chicago described as:

"The flats (that is the three floors) above the stores commonly known as 4831-483-485 North Clark street, and the middle and top floors above the store known as 349 North Clark street, in said building, and suitable basement room for steam plant; also coal room storage under sidewalk and in basement."

Upon trial plaintiff introduced in evidence a lease of the premises in writing dated December 8, 1932, whereby she leased to defendant the premises described for a term beginning May 1, 1933, to April 30, 1935, for a monthly rental therein reserved. The paragraph of the lease provided that if default was made in the payment of rent it should be lawful for the lessor or her election, without notice, to declare the term ended and to re-enter, etc. Plaintiff also testified that her son, Joseph C. Butts, had charge of the premises for her; and Joseph testified that defendant had not paid rent for the months of May, June and July, 1933;

that \$1890 was due under the lease for those months, and that defendant was in possession of the premises at the time suit was begun and at the time of trial. He further testified that on May 10th he asked defendant for the rent and defendant said he didn't have the money; that again about the middle of June defendant asked him if he wouldn't come down on the rent and the witness told him that he could not; that defendant then said, "I am not going to pay the rent. You will have to come down on the rent." The witness further said that if defendant would then tender the rent for the three months in question he would accept it and dismiss the suit.

Defendant then made a motion for a finding in his favor, which was denied, whereupon he testified that the Central Contracting company, a corporation, with which he was connected, was in possession of the premises. Defendant's counsel then stated that he would shew by the witness that the lease was assigned to C. A. Erickson & Brothers, a corporation, shortly after its execution; that the corporation took possession and had paid rent to the landlord, and that the necessity for the written consent of the landlord had been eliminated by the fact that the corporation paid rent to the landlord for seven years last past.

Defendant then produced a number of checks with which the rent was paid during the years 1923, 1924, 1925, 1926, 1927, 1928, 1929 and 1930. The checks were drawn to the order of plaintiff and endorsed by her, and signed "C. A. Erickson & Brothers" by "C. A. Erickson," president. Some of the checks bore a memorandum that the same were given for rent for 349-57 North Clark. Defendant testified that C. A. Erickson & Brothers was in possession of the premises during the year 1924 and down to April, 1930, and paid rent during the entire time.

There was also offered in evidence certificate showing

that \$100 was due under the lease for those months, and that defendant was in possession of the premises at the time suit was begun and at the time of trial. He further testified that on May 10th he asked defendant for the rent and defendant said he didn't have the money; that again about the middle of June defendant asked him if he wouldn't come down on the rent and the witness told him that he could not; that defendant then said, "I am not going to pay the rent. You will have to come down on the rent." The witness further said that if defendant would then tender the rent for the three months in question he would accept it and discontinue the suit. Defendant then made a motion for a finding in his favor, which was denied, whereupon he testified that the Central Contracting Company, a corporation, with which he was connected, was in possession of the premises. Defendant's counsel then stated that he would show by the witness that the lease was assigned to C. A. Erickson & Brothers, a corporation, shortly after its execution; that the corporation took possession and had paid rent to the landlord, and that the necessity for the written consent of the landlord had been eliminated by the fact that the corporation paid rent to the landlord for seven years last past. Defendant then produced a number of checks with which the rent was paid during the years 1923, 1924, 1925, 1926, 1927, 1928, 1929 and 1930. The checks were drawn to the order of plaintiff and endorsed by her, and signed "C. A. Erickson & Brothers" by "C. A. Erickson," president. Some of the checks bore a number and the same were given for rent for \$49.50 per month. Defendant testified that C. A. Erickson & Brothers was in possession of the premises during the year 1934 and down to April, 1935, and paid rent during the entire time. There was also offered in evidence certificates showing

that C. A. Erickson & Brothers had changed its name to the Central Contracting Company, but it was excluded upon plaintiff's objection. Defendant further testified that since the year 1923 and up to the time of the trial, the corporation conducted a contracting and real estate business in the premises in question; that there was a sign, "Newberry Apartment Hotel," on the premises. The witness admitted that the rent had not been paid for May, June or July 1930. On cross-examination, in response to the question, "What kind of a business are you running there?" he answered, "Rooming house and hotel." He further said that there were about 120 rooms in the building; that C. A. Erickson & Brothers was incorporated to engage in contracting and real estate business, namely, to buy, sell, rent or handle real estate; that C. A. Erickson & Brothers had an office or place of business in Chicago at 1016 North Clark street, where they engaged in the contracting business; that they were still conducting a rooming house and were in the painting, plastering and contracting business. Defendant also offered to show that all of the furnishings connected with this business were owned by the corporation, but an objection to this evidence was sustained.

Arthur Erickson, the treasurer of C. A. Erickson & Brothers, also testified that the corporation was in possession of the premises, and that it had paid the rent for the premises in question; that a rooming house hotel was conducted thereon. Offers of defendant to prove that fixtures and furniture in the building were purchased by C. A. Erickson & Brothers and that C. A. Erickson, the individual, had no chattels in the premises; that the corporation paid the electric light bill and all bills incidental to the conduct of the business carried on there, were made but denied by the court. An offer of a copy of the lease, with further offer to prove that the lease involving the premises was assigned by a written

prove that the issue involving the premises was assigned by a written order to the court. An order of a copy of the lease, with further offer to conduct of the business carried on there, were made but denied by the individual, had no interest in the premises; that the corporate- were purchased by C. A. Erickson & Brothers and that C. A. Erickson of defendant to prove that license and furniture in the building question; that a rooming house hotel was conducted thereon. Others the premises, and that it had paid the rent for the premises in Brothers, also testified that the corporation was in possession of Arthur Erickson, the treasurer of C. A. Erickson & sustained.

show that all of the furnishings connected with this business were plastering and contracting business. Defendant also offered to were still conducting a rooming house and were in the building, street, where they engaged in the contracting business; that they had an office or place of business in Chicago at 1010 North Clark self, rent of handle real estate; that C. A. Erickson & Brothers engage in contracting and real estate business, namely, to buy, in the building; that C. A. Erickson & Brothers was incorporated as house and hotel." He further said that there were about 150 rooms kind of a business are you running there?" he answered, "Rooming 1930. On cross-examination, in response to the question, "What near admitted that the rent had not been paid for May, June or July was a sign, "Newberry Apartment Hotel," on the premises. The wit- and real estate business in the premises in question; that there to the time of the trial, the corporation conducted a contracting tion. Defendant further testified that since the year 1923 and up Contracting Company, but it was excluded upon plaintiff's objection that C. A. Erickson & Brothers had changed its name to the Central

assignment affixed to the copy of the lease, by C. A. Erickson, the individual, to C. A. Erickson & Brothers, the corporation, and of a written acceptance of the assignment by the corporation, dated January, 1925, was denied admission in evidence.

We have recited the evidence quite at length. Defendant cites a number of cases, such as Webster v. Nichols, 104 Ill. 160; McConnell v. General Roofing Co., 187 Ill. App. 99, and Peacock v. Veltman, 243 Ill. App. 236, to the proposition that a lessor who accepts rent from the assignee of the lessee with knowledge of the assignment, consents to the assignment. He also cites authorities for a proposition (to which no citations are necessary) that this court will reverse a judgment which is against the manifest weight of the evidence. There is no doubt about either proposition of law, but here^{the} defect in the evidence offered by the defendant is failure to produce even a scintilla of evidence tending to show that the plaintiff had knowledge at any time that any assignment to the corporation, of which defendant was president, had been made. Without such proof the documentary evidence submitted had no weight. Indeed, an examination of the record leaves us in doubt whether this defense is presented in good faith. The court did not err, as defendant contends, in refusing to receive other evidence offered. It was wholly immaterial unless knowledge of the plaintiff, from which her consent to the assignment might be implied, was first proved.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

assignment affixed to the copy of the lease, by C. A. Erickson, the individual, to C. A. Erickson & Brothers, the corporation, and of a written acceptance of the assignment by the corporation, dated January, 1928, was denied admission in evidence.

We have recited the evidence quite at length. Defendant not only a number of cases, such as Wheeler v. Nichols, 104 Ill. 160; McDonnell v. General Hoelzer Co., 187 Ill. App. 90, and Peterson v. Helmer, 243 Ill. App. 826, to the proposition that a lessor who accepts rent from the assignee of the lessee with knowledge of the assignment, consents to the assignment. He also cites authorities for a proposition (to which no citations are necessary) that this court will reverse a judgment which is against the manifest weight of the evidence. There is no doubt about either proposition of law, but ^{the} defect in the evidence offered by the defendant is failure to produce even a scintilla of evidence tending to show that the plaintiff had knowledge at any time that any assignment to the corporation of which defendant was president, had been made. Without even such direct documentary evidence submitted had no weight. Indeed, an examination of the record leaves me in doubt whether this defense is presented in good faith. The court did not err, as defendant contends, in refusing to receive other evidence offered. It was wholly immaterial unless knowledge of the plaintiff, from which her consent to the assignment might be implied, was first proved.

The judgment is affirmed.

APPROVED.

O'Connor and McGinnis, JJ., dissent.

34705

MARCELLA GUTH,
Appellee,

vs.

J. V. HOHMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 618³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and upon trial by jury the verdict of \$750 for plaintiff was returned, and the court overruling motions for a new trial and in arrest, entered judgment thereon, from which defendant has appealed.

The declaration charged general negligence, excessive speed contrary to the statute, and that defendant drove his car on the wrong side of the street. There was a plea of the general issue and a special plea of non-ownership and non-operation, which last, however, was withdrawn. It is urged for reversal that plaintiff was guilty of contributory negligence as a matter of law; that the court erred in the giving and refusing of instructions.

The evidence tended to show that on December 7, 1928, about 7:30 p. m., plaintiff was riding as a guest and passenger in an automobile owned and driven by one Paul Hagestedt. The automobile was being driven in a westerly direction on the north side of Addison street, a public highway extending east and west, and near the intersection thereon of another public highway extending north and south, Kolmar avenue. Plaintiff was on her way to an entertainment and dance in Oak Park. At the same time defendant was driving his automobile in an easterly direction on the south side of Addison street, on his way to a musical recital, and the two cars collided near the intersection of Kolmar and Addison.

The evidence for plaintiff tends to show that she

34703

MARSHALL DUTY

Appellate

vs.

J. V. HOGAN

Appellant

APPEAL FROM SUPERIOR COURT

OF COON COUNTY.

2001.A.618

MR. PRESIDING JUSTICE MATTHEW
DEVLIN, THE OPINION OF THE COURT.

In an action on the case for personal injuries and upon trial by jury the verdict of \$200 for plaintiff was returned, and the court overruling motions for a new trial and in arrest, entered judgment thereon, from which defendant has appealed. The decision charged general negligence, excessive speed contrary to the statute, and that defendant drove his car on the wrong side of the street. There was a plea of the general issue and a special plea of non-ownership and non-operation, which last, however, was withdrawn. It is urged for reversal that plaintiff was guilty of contributory negligence as a matter of law; that the court erred in the giving and retaining of instructions. The evidence tended to show that on December 7, 1928, about 7:30 p. m., plaintiff was riding as a guest and passenger in an automobile owned and driven by one Paul Heggenst. The automobile was being driven in a westerly direction on the north side of Addison street, a public highway extending east and west, and near the intersection thereof of another public highway extending north and south, Joiner avenue. Plaintiff was on her way to an entertainment and dance in Oak Park. At the same time defendant was driving his automobile in an easterly direction on the south side of Addison street, on his way to a musical recital, and the two cars collided near the intersection of Joiner and Addison. The evidence for plaintiff tends to show that she

sat in the front seat on the right side; that the automobile was being driven slowly; that an eastbound motor coach approached from the west and when this coach was about 200 feet away the automobile of defendant pulled around to the north side of the motor coach at a high rate of speed; that at that time defendant's car was being driven in the middle of the street; that defendant pulled over to the north side of the street to avoid a large hole in the center of the street; that the hole was about 10 feet across and about 8 inches deep, having been caused by a break in the pavement; that when defendant's car was about 20 feet from the automobile in which plaintiff was riding the driver of the car in which plaintiff rode swerved the car to the northwest and applied the brakes; that the left side of defendant's car struck the left front of the car in which plaintiff was riding, throwing plaintiff through the windshield and injuring her quite severely.

It is the contention of defendant (and he produced evidence to show) that the driver of the Hagestedt car persisted in driving his car directly in the pathway of the defendant's car, which turned to the north in order to avoid the hole in the road, when he could have avoided the accident by turning to the north curb, the space between his car and the curb easily permitting such movement. The driver of the Hagestedt car may have been negligent in this respect. If so, it by no means follows that his negligence could be imputed to plaintiff. Defendant says that the driver of the car in which plaintiff rode was negligent, as above stated, "with the silent acquiescence and tacit approval of the plaintiff and without the plaintiff uttering one word of warning in the face of such imminent danger to her own safety," and he cites Flynn v. Chicago City Ry. Co., 250 Ill.460, to the point that plaintiff was thus guilty of contributory negligence which precludes her recovery. The Flynn case, however, is not

sat in the front seat on the right side; that the automobile was being driven slowly; that an eastbound motor coach approached from the west and when this coach was about 200 feet away the defendant pulled over to the north side of the street to avoid a large hole in the center of the street; that the hole was about 10 feet across and about 3 inches deep, having been caused by a break in the pavement; that when defendant's car was about 50 feet from the automobile in which plaintiff was riding the driver of the car in which plaintiff rode swerved the car to the northwest and applied the brakes; that the left side of defendant's car struck the left front of the car in which plaintiff was riding, throwing plaintiff through the windshield and injuring her quite severely.

It is the contention of defendant (and he produced evidence to show) that the driver of the defendant car detained in driving his car directly in the pathway of the defendant's car, which turned to the north in order to avoid the hole in the road, when he could have avoided the accident by turning to the north and the space between his car and the curb easily permitting such movement. The driver of the defendant car may have been negligent in this respect. If so, it by no means follows that his negligence could be imputed to plaintiff. Defendant says that the driver of the car in which plaintiff rode was negligent, as above stated, "with the slight negligence and tacit approval of the plaintiff and without the plaintiff incurring any sort of warning in the face of such imminent danger to her own safety," and he cites Vynn v. Chicago City Ry. Co., 250 Ill. 450, to the point that plaintiff was thus guilty of contributory negligence which precludes her recovery. The Vynn case, however, is not

controlling under facts such as appear here. In that case, the evidence shows, as the opinion of the court recites, that the plaintiff and one Cox, who owned a horse and buggy, were engaged in testing the qualities of the horse; that Cox had driven the horse for a time, when the plaintiff took the lines; that the night was dark, the road rough and the horse blind, and the occupants of the buggy more or less intoxicated. The court said that in view of these facts it was proper to prove that the vehicle in which the parties were riding was being driven in violation of the law, which proof raised the presumption that all the occupants of the buggy were, as a matter of law, guilty of negligence which would defeat a recovery.

Here the condition out of which the accident arose was such as to require an unexpected and immediate exercise of discretion on the part of the drivers of the respective machines. In the Flynn case all the parties who were in the buggy participated in the negligent acts and conduct resulting in the injury. Indeed, under circumstances such as appear here, we would be inclined to agree with the conclusion of the Supreme court of Michigan in the case of Slee v. Meller, 226 Mich. 151; 192 N.W. 530, to the effect "That advice or suggestions to drivers by passengers in case of emergency, are more apt to confuse than to help is a matter of common knowledge."

Also under the facts here it would seem to have been needless and useless for plaintiff to warn the driver of a danger of which the evidence shows he had as good knowledge as she, if not better. Jerke v. Buffalo R. & P. R. Co., 275 Pa. St. 459; Minnich v. Easton Transit Co., 267 Pa. St. 200, 110 Atl. 273; Bowen v. Osceola, 135 Wis. 11, 200 N. W. 766.

Defendant complains that the court refused to give this instruction:

contradicting under facts such as appear here. In that case, the evidence shows, as the opinion of the court recites, that the plaintiff and one Cox, who owned a horse and buggy, were engaged in testing the qualities of the horse; that Cox had driven the horse for a time, when the plaintiff took the lines; that the night was dark, the road rough and the horse blind, and the occupants of the buggy more or less intoxicated. The court said that in view of these facts it was proper to prove that the vehicle in which the parties were riding was being driven in violation of the law, which proof raised the presumption that all the occupants of the buggy were, as a matter of law, guilty of negligence which would defeat a recovery.

Here the condition out of which the accident arose was such as to require an unexpected and immediate exercise of discretion on the part of the drivers of the respective machines. In the Wynne case all the parties who were in the buggy participated in the negligent acts and conduct resulting in the injury. Indeed, under circumstances such as appear here, we would be inclined to agree with the conclusion of the Supreme Court of Michigan in the case of Ellis v. Miller, 226 Mich. 151; 193 N.W. 550, to the effect "That advice or suggestions to drivers by passengers in case of emergency, are more apt to confuse than to help is a matter of common knowledge."

Also under the facts here it would seem to have been needless and useless for plaintiff to warn the driver of a danger of which the evidence shows he had as good knowledge as she, if not better. Lewis v. Sullivan R. & N. Co., 273 Pa. 32, 408; Winkler v. Western Transit Co., 267 Pa. 81, 200, 110 Atl. 273; Kover v. Graceland, 188 Mich. 11, 200 N.W. 730. Defendant complains that the court refused to give

this instruction:

"If you believe from the evidence and under the instruction of the court that the defendant is not guilty of the negligence charged in plaintiff's declaration then you have no right to compromise the question of defendant's liability and grant the plaintiff some amount merely because she may have been injured on the occasion in question."

The law stated in this instruction was fully covered, we think, in other instructions.

Defendant also contends that the court erred in giving instruction No. 20, as follows:

"The court instructs the jury that the negligence, if any, of the driver of the automobile in which plaintiff was riding as a passenger cannot be imputed to the plaintiff in this case, and if you believe that the plaintiff at the time and place in question was in the exercise of reasonable care and caution for her own safety and that the defendant was negligent and that the negligence of the defendant, if any, was the proximate cause of the injury, if any, to the plaintiff then and in that event you are to find the defendant guilty."

It is urged that this instruction is erroneous on the authority of Opp v. Fryer, 294 Ill. 538, and Griffenhan v. Chicago Ry. Co., 299 Ill. 590. The instruction in the Opp case differs materially from the one of which defendant complains. In that case the court told the jury that if they believed from a preponderance of the evidence that the plaintiff was a guest in the automobile at the time of the accident, at the invitation of the owner, without authority to direct or in any manner control the conduct of the driver of the automobile, and that before and at the time of the accident she was in the exercise of ordinary care for her own safety, then the negligence of the driver of the automobile, if any, could not be imputed to her. The court said that it was essential for the plaintiff to prove that she was in the exercise of ordinary care for her own safety in approaching and going upon the crossing, and that she was not relieved from that duty because she was riding in an automobile; that the plaintiff sat at the right of the driver in front, with at least equal opportunity to observe danger and the approach of the train, and that being bound to prove the exercise

"If you believe from the evidence and under the instruction of the court that the defendant is not guilty of the negligence charged in plaintiff's declaration then you have no right to compromise the question of defendant's liability and grant the plaintiff some amount merely because she may have been injured on the occasion in question."

The law stated in this instruction was fully covered.

we think, in other instructions.

Defendant also contends that the court erred in

giving instruction No. 20, as follows:

"The court instructs the jury that the negligence, if any, of the driver of the automobile in which plaintiff was riding as a passenger cannot be imputed to the plaintiff in this case, and if you believe that the plaintiff at the time and place in question was in the exercise of reasonable care and caution for her own safety and that the defendant was negligent and that the negligence of the defendant, if any, was the proximate cause of the injury, it may, so the plaintiff then and in that event you are to find the defendant guilty."

It is urged that this instruction is erroneous on the

authority of Opp v. Pitzer, 204 Ill. 538, and Williamson v. Chicago

Eye, 200 Ill. 500. The instruction in the Opp case differs

materially from the one of which defendant complains. In that case

the court told the jury that if they believed from a preponderance

of the evidence that the plaintiff was a guest in the automobile

at the time of the accident, at the invitation of the owner, with-

out authority to direct or in any manner control the conduct of

the driver of the automobile, and that before and at the time of

the accident she was in the exercise of ordinary care for her own

safety, then the negligence of the driver of the automobile, if any,

could not be imputed to her. The court said that it was essential

for the plaintiff to prove that she was in the exercise of ordinary

care for her own safety in approaching and riding upon the crossing,

and that she was not relieved from that duty because she was riding

in an automobile; that the plaintiff lost at the time of the driver

in front, with at least equal opportunity to observe danger and the

approach of the train, and that being bound to give the exercise

of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, if practicable, and to warn the driver.

We have already pointed out the facts which distinguish this case from cases like the one there considered. The instruction given in the Griffenhan case also was materially different from that given here. There the court told the jury that if the negligence of two parties proximately contributed to cause an accident through which a third party was injured, it was not alone a defense for one of said parties to show that the other was also guilty of negligence which contributed to cause the injury to the third party, if the third party was at and before the time of the happening of the accident in the exercise of ordinary care. The court said that as an abstract proposition of law there was nothing materially wrong with the instruction, but that in view of the record in the case it was nearly certain to mislead the jury, and that the giving of it was prejudicial error.

We think there was no error in the giving or refusing of instructions. We have considered the same, although, with the exception of one of the instructions, it is impossible to tell from the abstract whether the same were given at the request of the defendant or of the plaintiff. Nor with the exception of instruction No. 1, which was refused, was there any exception by either party to the instructions.

The controlling questions of whether defendant was guilty of negligence or plaintiff was guilty of contributory negligence were submitted to the jury, and we find nothing in the record which requires a reversal. The judgment is therefore affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, it is contended, and to warn the driver.

It has already pointed out the facts which distinguished this case from cases like the one there considered. The instruction given in the Griffiths case also was materially different: now that given here. There the court told the jury that if the negligence of two parties proximately contributed to cause an accident through which a third party was injured, it was not alone a defense for one of said parties to show that the other was also guilty of negligence which contributed to cause the injury to the third party, if the third party was at and before the time of the happening of the accident in the exercise of ordinary care. The court said that as an abstract proposition of law there was nothing materially wrong with the instruction, but that in view of the record in the case it was nearly certain to mislead the jury, and that the giving of it was prejudicial error.

We think there was no error in the giving or retaining of instructions. We have considered the same, although, with the exception of one of the instructions, it is impossible to tell from the abstract whether the same were given at the request of the defendant or of the plaintiff. Nor with the exception of instruction No. 1, which was refused, was there any exception by either party to the instructions.

The controlling questions of whether defendant was guilty of negligence or plaintiff was guilty of contributory negligence were submitted to the jury, and we find nothing in the record which requires a reversal. The judgment is therefore affirmed.

Affirmed.

34714

MINNEAPOLIS-HONEYWELL REGULATOR
COMPANY, a Corporation,
Appellant,

vs.

F. A. CAVALLO,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 618

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation sued defendant in contract for a balance claimed to be due on account of goods sold and delivered by plaintiff to defendant at defendant's special instance and request and for interest upon the same. The statement of claim does not set up the particular character of the goods sold but a statement of account therein showed an item of claim to the amount of \$160 with credits therein of \$30, leaving a balance of \$130, to which was added \$4 for interest, making a total sum claimed of \$134.

Defendant filed an affidavit of merits in which it was averred that the statement of claim arose out of a contract executed and delivered by plaintiff and defendant about September 28, 1929, in and by which defendant ordered from plaintiff "one Minneapolis-Honeywell Heat Regulator" to be installed by plaintiff at 5337 Fletcher street, Chicago; that in and by the contract it was provided:

"The Company guarantees that the regulator to be installed will operate the dampers of the heating plant on a temperature change of two degrees or less at the thermostat;"

that defendant relied upon the covenants and conditions contained in the contract; that plaintiff installed in said premises a certain regulator; that said regulator would not operate the dampers of the heating plant on a temperature change of two degrees or less at the thermostat and would not regulate the heat; that it was so

MINNEAPOLIS-HONEYWELL REGULATOR
COMPANY, a Corporation,
Appellant.

vs.

F. A. CAVALLO,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2001A.618

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation sued defendant in contract for a balance claimed to be due on account of goods sold and delivered by plaintiff to defendant as defendant's special insurance and re-insurance and for interest upon the same. The statement of claim does not set up the particular character of the goods sold but a statement of account therein showed an item of claim to the amount of \$160 with credits therein of \$30, leaving a balance of \$130, to which was added 14 per interest, making a total sum claimed of \$154.

Defendant filed an affidavit of merits in which it was averred that the statement of claim arose out of a contract executed and delivered by plaintiff and defendant about September 25, 1930, in and by which defendant ordered from plaintiff "one Minneapolis-Honeywell Heat Regulator" to be installed by plaintiff at 5357 Fletcher Street, Chicago; and in and by the contract it was provided:

"The Company warrants that the regulator to be installed will operate the burners of the heating plant on a temperature change of two degrees or less at the thermostat;" that defendant relied upon the covenants and conditions contained in the contract; that plaintiff installed in said premises a certain regulator; that said regulator would not operate the burners of the heating plant on a temperature change of two degrees or less at the thermostat and would not regulate the heat; that it was so

defective that it was utterly unworkable; that defendant promptly notified plaintiff of the defective condition of the regulator; that plaintiff upon a number of occasions attempted to repair the regulator so that it would operate according to the terms of the contract but was unable to so repair it; that defendant elected to rescind the contract and notified plaintiff to remove the regulator upon returning to defendant the sum of \$30 which he had paid to plaintiff on account thereof before it became apparent that the regulator could not be adjusted; that this notice of election was given to plaintiff immediately upon it becoming apparent that the regulator could not be adjusted; that the regulator was so attached to the heating plant of defendant that defendant was fearful he could not safely remove the same, but that he tendered and offered to return the regulator to plaintiff.

Defendant also filed a statement of claim in off-set, setting up the same state of facts averred in his affidavit of merits, offering to permit plaintiff to remove the regulator and claiming damages in the sum of \$30.

There was a trial by the court, and at the close of all the evidence a finding was made against plaintiff on its claim and in favor of defendant on his off-set in the sum of \$30, for which amount judgment was entered. To reverse that judgment plaintiff has perfected this appeal.

The first contention of plaintiff seems to be that defendant could not on the facts recover against plaintiff on his off-set as a matter of law. It argues that as a condition precedent to recovery it was necessary for defendant to prove performance on his part of the essential requirements of the contract, and to this point Purcell v. Sage, 200 Ill. 342, and Atwell Printing & Binding Co. v. Prairie Farmer Publishing Co., 246 Ill. App. 100, are cited. These cases, as many others that also might have been

defective that it was utterly unworkable; that defendant promptly notified plaintiff of the defective condition of the regulator; that plaintiff upon a number of occasions attempted to repair the regulator so that it would operate according to the terms of the contract but was unable to so repair it; that defendant elected to rescind the contract and notified plaintiff to remove the regulator upon returning to defendant the sum of \$30 which he had paid to plaintiff on account thereof before it became apparent that the regulator could not be adjusted; that this notice of election was given to plaintiff immediately upon it becoming apparent that the regulator could not be adjusted; that the regulator was so attached to the heating plant of defendant that defendant was unable to remove the same, but that he tendered and offered to return the regulator to plaintiff.

Defendant also filed a statement of claim in 1911-12, setting up the same state of facts averred in his affidavit of notice, offering to permit plaintiff to remove the regulator and claiming damages in the sum of \$30.

There was a trial by the court, and at the close of all the evidence a finding was made against plaintiff on his claim and in favor of defendant on his 1911-12 in the sum of \$30, for which amount judgment was entered. To reverse that judgment plaintiff has perfected this appeal.

The first contention of plaintiff seems to be that defendant could not on the facts recover against plaintiff on his 1911-12 as a matter of law. It argues that as a condition precedent to recovery it was necessary for defendant to prove performance on his part of the essential requirements of the contract, and to this point Wright v. Wright, 200 Ill. 342, and Wright v. Wright, 200 Ill. 342, and Wright v. Wright, 200 Ill. 342, are cited. These cases, as many others that also might have been

cited, hold that a plaintiff may not recover in a suit on a contract without showing compliance on his part with the terms of it, but they have no application here. Defendant is not suing on the contract. The theory of his suit is that by reason of the failure of the guaranty made by plaintiff he had a right to rescind the contract and to demand a return of the money he had paid. The cases cited are therefore not in point.

Plaintiff contends in the next place that the judgment is against the weight of the evidence, but in order to properly consider that point it is necessary first to dispose of the further contention of plaintiff that the court erred in permitting Mrs. Cavallo, wife of defendant, to testify in behalf of her husband. Plaintiff has cited a number of authorities, such as Nechem on Agency, par. 100, p. 73; Rawson v. Curtis, 19 Ill. 456; Maxey v. Heckethorn, 44 Ill. 437, and Cahill's Ill. Rev. Stats. 1929, chap. 51, sec. 5. par. 5, to this effect. Here, again, there is no doubt of the general rule of law, but an examination of the bill of exceptions discloses (what does not appear from an examination of the abstract) that while the counsel for plaintiff at first objected when the testimony of Mrs. Cavallo was offered, he afterwards, as the record recites, "agreed to let witness testify in the following words, 'Let her go ahead; I want to cross examine her.'" Having in this manner waived the objection that she be first qualified by proof of her agency in behalf of her husband, plaintiff cannot be heard in this court to complain that she was an incompetent witness.

We will therefore consider next the second point urged, namely, that the judgment is manifestly against the weight of the evidence. The record discloses a contract in writing made on September 21, 1929, whereby defendant gave an order for a heat regulator, describing the same, at the price of \$160, payments

alleged, holds that a plaintiff may not recover in a suit on a contract without showing compliance on his part with the terms of it, but they have no application here. Defendant is not suing on the contract. The theory of his suit is that by reason of the failure of the guaranty made by plaintiff he had a right to rescind the contract and to demand a return of the money he had paid. The cause cited are therefore not in point.

Plaintiff contends in the next place that the judgment is against the weight of the evidence, but in order to properly consider that point it is necessary first to dispose of the further contention of plaintiff that the court erred in permitting Mrs. Cavallio, wife of defendant, to testify in behalf of her husband. Plaintiff has cited a number of authorities, such as Boehm on Agency, par. 100, p. 73; Lawson v. Curtis, 12 Ill. 450; Maxey v. Rockburgh, 44 Ill. 437, and Cavallio's Ill. Rev. Stat. 1929, chap. 51, sec. 2, par. 2, to this effect. Here, again, there is no doubt of the general rule of law, but an examination of the bill of exceptions discloses (what does not appear from an examination of the abstract) that while the counsel for plaintiff at first objected when the testimony of Mrs. Cavallio was offered, he afterwards, as the record recites, "retired so far witness testify in the following words, 'Let her go ahead; I want to cross examine her.'" Having in this manner waived the objection that she be first qualified by proof of her agency in behalf of her husband, plaintiff cannot be heard in this court to complain that she was an incompetent witness.

We will therefore consider next the second point urged, namely, that the judgment is manifestly against the weight of the evidence. The record discloses a contract in writing made on September 21, 1929, whereby defendant gave an order for a heat register, describing the same, at the price of \$180, payable

with interest to be made in installments. Under the heading, "Guarantee and Service" the contract states:

"The company guarantees that the regulator to be installed will operate the dampers of the heating plant on a temperature change of two degrees or less at the thermostat.***"

Upon the trial Mrs. Cavalle testified that she was the agent of defendant; that although he signed the contract she attended to the matter and made the payments on the contract; that the regulator installed "would not work and never did work;" that she had people out several times to fix it but that it was just the same after it was fixed; that at great expense she had purchased several kinds of coal thinking that was the trouble, but that "still the regulator didn't work;" that they nearly froze in the house; that she herself disconnected the regulator at the direction of plaintiff's agent, who instructed her how to disconnect it; that she had made several complaints about the regulator, but that the only written complaint she ever made was one which she wrote on January 15, 1930, (which appears in evidence as plaintiff's exhibit 4). She further testified that on a certain occasion when a man from plaintiff's office was there fixing the regulator, he said in the presence of one of her neighbors that sometimes the regulators didn't work, and that this particular regulator should be returned to plaintiff.

Mrs. Blank, a neighbor of defendant, testified that she was at defendant's home when a man was there from the plaintiff company; that she heard him tell Mrs. Cavalle that sometimes the regulators didn't work and that this one should be returned.

At the close of the testimony for defendant, attorney for plaintiff made a motion for a finding for plaintiff on the claim and on the off-set, but the motion was denied. Whereupon a sales manager for plaintiff testified in behalf of plaintiff that he was in charge of the territory in which defendant lived and

with intent to be made in installments. Under the heading.

"Guarantee and Service" the contract stated:

"The company guarantees that the regulator to be installed will operate the burner of the heating plant on a temperature change of two degrees or less at the thermostat..."

Upon the trial Mrs. Cavell testified that she was the

agent of defendant; that although he signed the contract she attended to the matter and made the payments on the contract; that the regulator installed "would not work and never did work"; that she had people out several times to fix it but that it was just the same after it was fixed; that at great expense she had purchased several kinds of coal thinking that was the trouble, but that "still the regulator didn't work"; that they nearly froze in the house; that she herself disconnected the regulator at the request of plaintiff's agent, who instructed her how to disconnect it; that she had made several complaints about the regulator, but that the only written complaint she ever made was one which she wrote on January 15, 1930, (which appears in evidence as plaintiff's exhibit 4). She further testified that on a certain occasion when a man from plaintiff's office was there fixing the regulator, he said in the presence of one of her neighbors that sometimes the regulators didn't work, and that this particular regulator should be returned to plaintiff.

Mrs. Blank, a neighbor of defendant, testified that she was at defendant's home when a man was there from the plaintiff company; that she heard him tell Mrs. Cavell that sometimes the regulators didn't work and that this one should be returned.

At the close of the testimony for defendant, attorney

for plaintiff made a motion for a finding for plaintiff on the claim and on the offer, but the motion was denied. Whereupon a sales manager for plaintiff testified in behalf of plaintiff that he was in charge of the territory in which defendant lived and

was familiar with the case; that complaints had been received from defendant that the regulator didn't work; and that he instructed one of their employees, Mr. Matthes, to go to defendant's home and inspect the regulator; that Matthes brought back to him certain inspection and repair sheets which were signed by defendant and also a repair sheet which was not signed by defendant. These sheets were offered in evidence and marked as plaintiff's exhibits 1, 2 and 3. The sales manager further testified that he was personally familiar with the regulator in question and that it worked perfectly; that there were no defects in it "unless it had been changed or damaged since I last saw it." The witness did not state, however, when he had last seen the regulator nor whether he ever saw or examined it after it was put up on defendant's premises. His testimony therefore has very little weight.

Matthes testified for plaintiff that he called at defendant's home a number of times and examined the regulator in question; that he called on December 6, 1929, and examined it; that it was then in good shape and working perfectly; that he called again on December 31, 1929, and examined the regulator and that it was then all right and working perfectly; that on January 9, 1930, he again called and examined the regulator, which he found disconnected; that defendant then told him that he would not let him connect it, that the service man had been there two or three times to fix it, that it had never worked right, that it would open and close the draft all right, but that the fire would go out. The witness said that on January 9th he examined the regulator and found it to be "all right and in good condition."

The original contract, the service reports, and a letter of Mrs. Cavallo dated January 15, 1930, were introduced in evidence by plaintiff. These documents tend to corroborate Mrs. Cavallo's testimony to the effect that the regulator failed to

was familiar with the case; that complaints had been received from defendant that the regulator didn't work; and that he instructed one of their employees, Mr. Nathan, to go to defendant's home and inspect the regulator; that Nathan brought back to him certain inspection and repair sheets which were signed by defendant and also a repair sheet which was not signed by defendant. These sheets were offered in evidence and marked as plaintiff's exhibits 1, 2 and 3. The sales manager further testified that he was personally familiar with the regulator in question and that it worked perfectly; that there were no defects in it "unless it had been changed or damaged since I last saw it." The witness did not state, however, when he had last seen the regulator nor whether he ever saw or examined it after it was put up on defendant's premises. His testimony therefore has very little weight.

Nathan testified for plaintiff that he called at defendant's home a number of times and examined the regulator in question; that he called on December 6, 1932, and examined it; that it was then in good shape and working perfectly; that he called again on December 21, 1932, and examined the regulator and that it was then all right and working perfectly; that on January 9, 1933, he again called and examined the regulator, which he found disconnected; that defendant then told him that he would not let him connect it, that the service man had been there two or three times to fix it, that it had never worked right, that it would open and close the draft all right, but that the fire would go out. The witness said that on January 21 he examined the regulator and found it to be "all right and in good condition."

The original contract, the repair tickets, and a letter of Mrs. Cavallo dated January 12, 1933, were introduced in evidence by plaintiff. These documents tend to corroborate Mrs. Cavallo's testimony to the effect that the regulator failed to

O'Connor and McSurely, JJ., concur.

34748

THE PEOPLE OF THE STATE
OF ILLINOIS,

Appellee,

vs.

STANLEY ADAMS,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 618

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by Adams, defendant, named in an information filed in the Municipal court of Chicago, which charged him with the offense of fraudulently obtaining money under false pretenses. The order from which the appeal was taken was entered on June 3, 1930, and purports to expunge certain parts of the record in the cause as made by the clerk on January 27th and February 14th, 1930.

The information was filed December 7, 1928. The transcript of the record shows the various orders postponing, etc., and that on March 14, 1930, the State's attorney represented to the court that he was unwilling to prosecute further and an order was entered that defendant be discharged.

More than thirty days thereafter, namely, on May 22, 1930, the transcript shows a petition filed by an assistant state's attorney, in which he averred that he was present before the court on January 27, 1930, and that as a matter of fact complainants Noble and Thumm were not present; that on February 14th also the, assistant State's attorney, was present in court; that Adams then informed the court that his counsel was engaged before one of the Judges of the Criminal court; that when the attorney for Adams arrived complainant Thumm had left the court room to keep a business engagement and the cause was again continued; that neither complainant Thumm nor any other witness in the cause was sworn; that the

THE PEOPLE OF THE STATE
OF ILLINOIS,

Appellee,

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

vs.

STANLEY ADAMS,

Appellant.

300 I.A. 618

MR. PRESIDING JUSTICE WATSON
DELIVERED THE OPINION OF THE COURT.

This appeal is presented by Adams, defendant, named in an information filed in the municipal court of Chicago, which charged him with the offense of fraudulently obtaining money under false pretenses. The order from which the appeal was taken was entered on June 2, 1930, and purports to expunge certain parts of the record in the cause as made by the clerk on January 27th and February 14th, 1930.

The information was filed December 7, 1928. The transcript of the record shows the various orders postponing, etc., and that on March 14, 1930, the State's attorney represented to the court that he was unwilling to prosecute further and an order was entered that defendant be discharged.

More than thirty days thereafter, namely, on May 28, 1930, the transcript shows a petition filed by an assistant State's attorney, in which he averred that he was present before the court on January 27, 1930, and that as a matter of fact complainants Noble and Thum were not present; that on February 14th also the assistant State's attorney was present in court; that Adams then informed the court that his counsel was engaged before one of the judges of the Criminal court; that when the attorney for Adams arrived complainant Thum had left the court room to keep a business engagement and the cause was again continued; that neither complainant and Thum nor any other witness in the cause was sworn; that the

clerk of the court entered upon the record in the cause the following, to-wit:

"January 27, 1930. Defendant arraigned. Pleads not guilty. Defendant waives jury trial. Trial by court postponed to February 14, 1930;"

and further:

"February 14, 1930, trial by Court resumed and postponed to February 20, 1930;"

that both of said orders were entered erroneously by the court and did not recite truly the facts as they occurred at the times mentioned. The petition prayed that these orders be expunged from the record. The transcript further recites a motion to strike the petition from the files, which was overruled and leave was given to file counter affidavits. Other affidavits also appear in the transcript of the record, together with an order entered June 3, 1930, which recites;

"It appearing to the Court that an error has been made by the Clerk of the Court, it is hereby ordered that the words 'Defendant arraigned. Plea not guilty. Defendant waives jury trial. Trial by court commenced and postponed to February 14, 1930,' entered under date of January 27, 1930, be and are hereby expunged from the record and that the words 'Cause continued to February 14, 1930,' be entered of record under date of January 27, 1930.

"It further appearing to the Court that an error has been made by the Clerk of the Court, it is hereby ordered that the words 'Trial by court resumed and postponed to February 20, 1930, at 11 o'clock A. M.' entered under date of February 14, 1930, be and are hereby expunged from the record and that the words 'Cause continued to February 20, 1930' be entered of record under date of February 14, 1930. All orders of June 3, 1930, entered as per Draft Order, approved and ordered filed."

There is no bill of exceptions.

There is a controlling reason why this appeal may not be considered by this court. It is elementary that the right of appeal is purely statutory; that the same has not been given in criminal cases; and further, that an appeal lies only "to review final judgments, orders or decrees," etc. A final order or decree is one that finally disposes of the issues between the parties on the merits.

clerk of the court entered upon the record in the cause the following

and further:

"January 27, 1930. Defendant arraigned. Pleas not guilty. Defendant waived jury trial. Trial by court postponed to February 14, 1930."

and further:

"February 14, 1930. Trial by Court resumed and postponed to February 20, 1930."

That both of said orders were entered erroneously by the clerk and did not recite truly the facts as they occurred at the time mentioned. The petition prayed that these orders be expunged from the record. The transcript further recites a motion to strike the petition from the files, which was overruled and leave was given to the counter affidavit. Other affidavits also appear in the transcript of the record, together with an order entered June 2,

1930, which recites:

"It appearing to the Court that an error has been made by the Clerk of the Court, it is hereby ordered that the words 'Defendant arraigned. Pleas not guilty. Defendant waived jury trial. Trial by court postponed and postponed to February 14, 1930,' entered under date of January 27, 1930, be and are hereby expunged from the record and that the words 'Guilty entered to February 14, 1930,' be entered of record under date of January 27, 1930."

"It further appearing to the Court that an error has been made by the Clerk of the Court, it is hereby ordered that the words 'Trial by court resumed and postponed to February 20, 1930, at 11 o'clock A. M.' entered under date of February 14, 1930, be and are hereby expunged from the record and that the words 'Guilty entered to February 20, 1930,' be entered of record under date of February 14, 1930. All orders of June 2, 1930, entered as per Court Order, approved and ordered filed."

There is no bill of exceptions.

There is a controlling reason why this appeal may not

be considered by this court. It is elementary that the right of appeal is purely statutory; that the same has not been given in criminal cases; and further, that an appeal lies only "to review final judgments, orders or decrees," etc. A final order or decree is one that finally disposes of the issues between the parties on the merits.

Smith-Hurd's Ill. Rev. Stats., chap. 110, sec. 91, p. 2191. This is not such an order.

The appeal having been improvidently granted, it will be dismissed.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

Smith-Hurd's 111. Rev. Stats., chap. 116, sec. 91, p. 3191. This
is not such an order.
The appeal having been impermissibly granted, it will
be dismissed.

APPEAL DISMISSED.

O'Connor and McGurty, 111, consent.

34761

LEVIT & ROYNER CO.,
a Corporation,
Defendant in Error,

vs.

MORRIS CHALFIN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 619'

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by defendant in the trial court to reverse a judgment in the sum of \$7500 entered in favor of plaintiff upon the verdict of a jury, motions for a new trial and in arrest having been overruled. Plaintiff's action was in assumpsit for commissions alleged to have been earned as a real estate broker in procuring a 99-year lease on premises known as 1705-1707 West Chicago avenue, Chicago.

The declaration alleges that plaintiff at the request of defendant procured a tenant ready, able and willing to lease on terms named by defendant, by reason whereof defendant became indebted to plaintiff in the sum of \$11,797.97, which was the usual and customary charge as provided by the Chicago Real Estate Board in its schedule of rates for such services; that although that sum was due and defendant agreed to pay it and although requested to pay defendant refused to do so. The common counts were also attached to the declaration with an affidavit of the amount said to be due.

Defendant filed a plea of the general issue with an affidavit of merits, in which the employment of plaintiff and the alleged fact that he had procured a tenant ready, willing, etc., are denied. The affidavit also denies that plaintiff was licensed as a broker; that fair and usual charges amounted to the sum of \$11,797.97, and denies any promise to pay plaintiff any sum or the amount provided in the schedule of rates of the Chicago Real Estate Board. The affidavit further denies that plaintiff procured a

24781

LEVIT & HOOKER CO.,
a corporation,

Defendant in Error,

vs.

MORRIS CHAMBERLIN,

Plaintiff in Error.

ERROR TO SUPREME COURT

ON COOK COUNTY.

\$2001.A.619

MR. PRESIDING JUSTICE WATCHETT
Delivered the opinion of the court.

This writ of error is sued out by defendant in the

trial court to reverse a judgment in the sum of \$7800 entered in
favor of plaintiff upon the verdict of a jury. Motion for a new
trial and in arrest having been overruled. Plaintiff's action was
in assumpsit for commissions alleged to have been earned as a real
estate broker in procuring a 99-year lease on premises known as
1702-1704 West Chicago Avenue, Chicago.

The declaration alleges that plaintiff at the request
of defendant procured a tenant ready, able and willing to lease on
terms named by defendant, by reason whereof defendant became in-
debted to plaintiff in the sum of \$11,787.97, which was the usual
and customary charge as provided by the Chicago Real Estate Board
in its schedule of rates for such services; that although that sum
was due and defendant agreed to pay it and although requested to
pay defendant refused to do so. The common counts were also set forth
to the declaration with an affidavit of the amount said to be due.
Defendant filed a plea of the general issue with an
affidavit of merit, in which the employment of plaintiff and the
alleged fact that he had procured a tenant ready, willing, etc.,
are denied. The affidavit also denies that plaintiff was licensed
as a broker; that fair and usual charges amounted to the sum of
\$11,787.97, and denies any promise to pay plaintiff any sum or the
amount provided in the schedule of rates of the Chicago Real Estate
Board. The affidavit further denies that plaintiff procured a

tenant to meet the terms of a 99-year lease or a tenant who agreed with defendant for a 99-year lease; that defendant is indebted in any sum whatever.

Defendant contends that the plaintiff corporation was not authorized under the laws of this state to engage in the real estate brokerage business; that it is expressly forbidden by chapter 32, section 1 (see Cahill's Ill. Stat. 1929) to engage in such business; that its acts in that respect were therefore against public policy and void; that no recovery could therefore be had for its services; that in consequence the declaration of plaintiff and every count of it failed to state a cause of action; that there was a variance therefore between the proof and the pleading which would require the judgment to be set aside, and that the plaintiff corporation could not recover on the strength of the fact that its officers were themselves licensed as individuals. These points are made on the authority of Maherer & Co. v. Smerling, 225 Ill. App. 336, affirmed in 307 Ill. 191. The points would have merit if it were not for the fact that by amendments to par. 3, sec. 3, chap. 32 of the General Incorporation act (see Cahill's Ill. Rev. State. 1929) organization of corporations, such as plaintiff, "for the purpose of acting as agents and brokers for others in the purchase, sale, renting and management of real estate and leasehold interests," has been expressly authorized. Apparently, however, the prohibition (we presume by inadvertence) of the first section against organization of such corporations was not eliminated. Moreover, the capacity to sue was admitted by the plea of the general issue in the absence of a special plea setting up the lack of capacity or that the contract was ultra vires. Towle Lumber Co. v. Anderson, 281 Pac. 500; Glendale Lumber Co. v. Beckman Lumber Co., 152 Mo. App. 386; Bailey v. Valley Nat'l Bank, 127 Ill. 332; Wheatley, Buck & Co. v. Chicago Trust & Savings Bank, 167 Ill. 480; Chicago

tenant to meet the terms of a 99-year lease or a tenant who agreed with defendant for a 99-year lease; that defendant is indebted in any sum whatever.

Defendant contends that the plaintiff corporation was

not authorized under the laws of this state to engage in the real estate brokerage business; that it is expressly forbidden by chapter 38, section 1 (see Cahill's Ill. Stat. 1929) to engage in such business; that the acts in that respect were therefore against public policy and void; that no recovery could therefore be had for its services; that in consequence the declaration of plaintiff and every count of it failed to state a cause of action; that there was a variance therefore between the proof and the pleading which would require the judgment to be set aside, and that the plaintiff corporation could not recover on the strength of the fact that its officers were themselves licensed as individuals. These points

are made on the authority of Exeter & Co. v. Wharfing, 233 Ill. App. 356, affirmed in 307 Ill. 191. The points would have merit if it were not for the fact that by amendments to par. 3, sec. 3, chap. 38 of the General Incorporation Act (see Cahill's Ill. Stat. 1929) organization of corporations, such as plaintiff, "for the purpose of acting as agents and brokers for others in the purchase, sale, leasing and management of real estate and interests," has been expressly authorized. Apparently, however, the prohibition (as phrased by inadvertence) of the first section against organization of such corporations was not eliminated. Moreover, the capacity to sue was admitted by the plea of the general issue in the answer of a special plea setting up the lack of capacity or that the contract was ultra vires. Towle Lumber Co. v. Anderson, 261 Pac. 206; Glendale Lumber Co. v. Beckman Lumber Co., 182 Mo. App. 386; Ballou v. Valley Nat'l Bank, 137 Ill. 323; Wharfing Bank & Co. v. Chicago Trust & Savings Bank, 167 Ill. 430; Chicago

Pneumatic Tool Co. v. Munnell, 107 Ill. App. 344. It follows there is no merit in the contention of defendant that the plaintiff corporation was not duly licensed.

Defendant also contends that the verdict is inconsistent with the proof; that plaintiff's claim was for \$11,797.97 and that the proof showed that either that amount was due or nothing; that the verdict for only a part of the claim was a compromise verdict, indicating a lack of due consideration of evidence on the part of the jury. Defendant cites Belanakes v. Victory Ice & Ice-cream Co., 246 Ill. App. 173, and other similar cases which so hold.

There might be something of merit in this contention were it not for the fact that defendant offered evidence in his own behalf tending to show that a less amount was due on a quantum meruit basis than that claimed by plaintiff and asked two instructions upon that theory, which the trial court allowed. He also argued that theory to the jury. Having tried his case upon one theory at nisi prius and lost it, he cannot be permitted to try it on a different theory in this court and succeed. Martin v. Leslie, 93 Ill. App. 44; Trege v. Rubovitz, 178 Ill. App. 127; 4 Corpus Juris, p. 715, sec. 2629, p. 717, sec. 2632.

Defendant also contends that a new trial should have been granted on account of the misconduct of one of the bailiffs in charge of the jury. It is contended that the bailiff without leave or authority entered the jury room after the jury had been deliberating for some hours and told the jury that he would look them up if a verdict was not reached in fifteen minutes. It is urged that this misconduct on the part of the officer was so serious as to require defendant's motion for a new trial to be granted. Conceding such conduct by the bailiff to be improper, the affidavits submitted in support of the motion for a new trial are not convincing since they are based entirely on hearsay. No

Prunelle Tool Co. v. Hannaford, 197 Ill. App. 3d. 344. It follows there

is no merit in the contention of defendant that the plaintiff con-

cession was not duly licensed.

Defendant also contends that the verdict is inconsistent

with the facts; that plaintiff's claim was for \$11,797.97 and

that the record shows that either that amount was due or nothing;

that the verdict for only a part of the claim was a compromise ver-

dict, indicating a lack of due consideration of evidence on the

part of the jury. Defendant cites Helfman v. Victoria Ice & Cold

Storage Co., 246 Ill. App. 170, and other similar cases which are void.

There might be something of merit in this contention

were it not for the fact that defendant offered evidence in his own

defense, tending to show that a lesser amount was due on a business

which basis then that claimed by plaintiff and asked two instru-

tions upon that theory, which the trial court allowed. He also

argued that theory to the jury, having cited his case upon one

theory of legal error and lost it, he cannot be permitted to try it

on a different theory in this court and succeed. Wright v. Laidie,

93 Ill. App. 44; Tracy v. Ruppel, 178 Ill. App. 197; 4 Green 412.

q. 115, sec. 2432, p. 117, sec. 2433.

Defendant also contends that a new trial should have

been granted on account of the misconduct of one of the parties

in charge of the jury. It is contended that the plaintiff without

leave or authority entered the jury room after the jury had been

deliberating for some hours and told the jury that he would look

them up in a verdict was not reached in fifteen minutes. It is

argued that this misconduct on the part of the plaintiff was so

serious as to require defendant's motion for a new trial to be

granted. Concerning such conduct by the plaintiff to be improper,

the appellate authorities are in support of the motion for a new trial

are not convincing since they are based entirely on hearsay, be

affidavit of any juror or any other person having direct knowledge was submitted. The verdict of a jury ought not to be set aside upon such a showing. Leach v. Wilbur, 91 Mass. 212; Darling v. N. Y. R. R. Co., 17 N. I. 708, 24 Atl. 462; Kansas City R. R. Co. v. 198 Ala. Phillip, 159, 13 So. 65; Whitelans v. Whitelans, 83 Va. 90, 1 S.E. 407; Physioc v. Shea, 75 Ga. 466.

It is contended in the next place that the court erred in admitting in evidence two writings which appear in the record as plaintiff's exhibits 2 and 6. Exhibit 6 is a letter written by I. W. Marcus, a salesman for the plaintiff company, to Milton H. Callner, the proposed lessee, on November 13, 1928, and is as follows:

"Dear Mr. Callner:

We were advised by Mr. Chalfin to meet Mr. Leviton, his attorney, this afternoon concerning the 99 year lease on 1705-07 W. Chicago Avenue. At our meeting with Mr. Leviton the following points were suggested by him to be embodied in the lease. They are in fact the very terms and conditions outlined by you and Mr. Chalfin during our meeting at your office yesterday.

(1) \$50,000 security on lease. This security to remain until completion of building and to be returned to Lessee upon completion of building.

(2) There is to be a basement of 8½ feet from ground to ceiling covering the entire lot. Building is to be of not less than 2 stories the second floor to be of at least 13 ft. in height. Plans and specifications embodying the above points to be approved by Lessor.

(3) If a one-story building is built, a foundation is to be provided strong enough to carry a three-story building. The first floor of the building is to be used exclusively for mercantile purposes.

(4) In the event the building is not constructed within the provided period of five years, certain indemnities in favor of the Lessor should be provided for.

(5) All rents to be net rents to the Lessor, the Lessee paying such items as insurance of building, general taxes, etc. In the event that a law is passed basing taxes on the income of the building, lessee is to pay such taxes.

(6) The rental to be \$10,000 for a period of 10 years and \$12,000 for a period of 89 years. Rent to be payable semi-annually in advance. Lessee to have option to purchase the fee within a period of two years from date of lease at a price of \$170,000.

Please notify us what arrangements to make with your attorney for the purpose of meeting Mr. Leviton to close up the matter. Thanking you for an immediate reply, we are

Very truly yours,

I. W. Marcus

For: Levit & Rovner Co."

affidavit of any tutor or any other person having direct knowledge
was submitted. The verdict of a jury ought not to be set aside
upon such a showing. Leach v. Wilbur, 91 Conn. 512; Waring v.
N. Y. N. H. Co., 17 N. Y. 208, 24 Ala. 482; Kansas City N. H. Co. v.
198 Ala.
Pollock v. 190, 12 So. 88; Walters v. Walters, 83 Va. 90, 1 U.S.
407; Proctor v. 190, 75 Cal. 480.

It is contended in the next place that the court erred
in admitting in evidence two writings which appear in the record as
plaintiff's exhibits 2 and 3. Exhibit 2 is a letter written by
I. W. Watson, a salesman for the plaintiff company, to Milton H.
Callier, the proposed lessee, on November 17, 1933, and is as follows:

"Dear Mr. Callier:
We were advised by Mr. Chaikin to meet Mr. Leach, his
attorney, this afternoon concerning the 99 year lease on
1933-07-2. Chicago Avenue. At our meeting with Mr. Leach the
following points were suggested by him to be embodied in the
lease. They are in fact the very terms and conditions outlined
by you and Mr. Chaikin during our meeting at your office yesterday.
(1) \$25,000 security on lease. This security to remain
until completion of building and to be returned to lessee upon
completion of building.
(2) There is to be a basement of 3 feet from ground to
ceiling covering the entire lot. Building is to be of not less
than 2 stories the second floor to be of at least 13 ft. in
height. Plans and specifications embodying the above points
to be approved by lessor.
(3) It is a one-story building is built, a foundation is to
be provided strong enough to carry a three-story building. The
first floor of the building is to be used exclusively for mer-
cantile purposes.
(4) In the event the building is not constructed within
the provided period of five years, certain limitations in favor
of the lessor should be provided for.
(5) All rents to be net rents in the lessor. The lessee
paying such items as insurance of building, general taxes, etc.
In the event that a law is passed taxing on the income of
the building, lessee is to pay such taxes.
(6) The rental to be \$10,000 for a period of 10 years and
\$15,000 for a period of 20 years. Rent to be payable semi-
annually in advance. Lessee to have option to purchase the lot
within a period of two years from date of lease at a price of
\$170,000.
Please notify us what arrangements to make with your attorney
for the purpose of meeting Mr. Leach to draw up the matter.
Thanking you for an immediate reply, we are
Very truly yours,
I. W. Watson
Per: Leach & Brown Co."

Plaintiff's exhibit 2 is a letter signed by plaintiff by its salesman J. W. Rovner, is directed to defendant and is as follows:

"November 14, 1923.

Dear Mr. Chalfin:

Following the meeting that you suggested we have with your attorney, Mr. Leviton, we submitted to Mr. Callner the final draft of terms which Mr. Leviton outlined to us. These terms are in effect the same as those outlined by you and Mr. Callner in his office on Monday. Mr. Callner, as we informed you this morning, is now ready, as he was on Monday when we all met at his office, to enter into the ninety-nine year lease immediately in accordance with these terms outlined.

After seeing you this morning we followed your suggestion and called Mr. Leviton, telling him that you advised us to ask him to make arrangements to meet Mr. Callner's lawyers for the purpose of drawing up the lease. Mr. Leviton told us that before taking the matter up with Mr. Callner's attorneys he wanted us to settle the question of commission with you. We were surprised to hear this, because we did not know that there is anything to settle. There is no question about the commission. You have never questioned it, and even as late as this morning, when Mr. Marcus and I were at your store, there was nothing said by you that would indicate that you are questioning the commission earned by us in negotiating this lease.

We do not think it would be advisable to delay drawing the lease. It took a great deal of time and effort to negotiate this advantageous lease for you. Now that you and Mr. Callner have both agreed on the terms and all that remains to be done is to look after the legal end of it, we suggest that you proceed without delay.

Very truly yours,

Levit & Rovner Co. by J. W. Rovner."

While both of these documents, particularly the letter of November 13th, are undoubtedly in some respects self-serving and hence not admissible for the purpose of binding defendant (Oliphant v. Liversidge, 142 Ill. 160; City v. McKechney, 205 Ill. 468; Hill v. Pratt, 29 Vt. 119), we think they are so closely connected with the subject matter of the proposed lease that for the purpose of indicating the services actually performed on the part of plaintiff, the court did not err in receiving the same in evidence. Hill v. Carson, 177 Ill. App. 314; Loving v. Kane, 180 Ill. App. 614; Rounds v. Victoria Hotel Co., 184 Ill. App. 500.

The controlling question, however, between the parties arises out of the contention of defendant that in view of the subject

Plaintiff's Exhibit 2 is a letter signed by Plaintiff

by the witness J. W. Hoover, is directed to defendant and is

as follows:

"November 14, 1933.

Dear Mr. Galt:

Following the meeting that you suggested we have with your attorney, Mr. Leavelle, we submitted to Mr. Galtner the final draft of terms which Mr. Leavelle outlined to us. These terms are in effect the same as those outlined by you and Mr. Galtner in his office on Monday. Mr. Galtner, as we informed you this morning, is now ready, as he was on Monday when we all met at his office, to enter into the ninety-nine year lease immediately in accordance with these terms outlined.

After seeing you this morning we followed your suggestion and called Mr. Leavelle, telling him that you advised us to ask him to make arrangements to meet Mr. Galtner's lawyers for the purpose of drawing up the lease. Mr. Leavelle said that he would take the matter up with Mr. Galtner's attorneys he wanted us to settle the question of commission with you. We were surprised to hear this, because we did not know that there is anything to settle. There is no question about the commission. You have never mentioned it, and even as late as this morning when Mr. Hoover and I were at your store, there was nothing said by you that would indicate that you are questioning the commission earned by us in negotiating this lease.

We do not think it would be advisable to delay drawing the lease. It took a great deal of time and effort to negotiate this advantageous lease for you. Now that you and Mr. Galtner have both agreed on the terms and all that remains to be done is to look after the legal end of it, we suggest that you proceed without delay.

Very truly yours,
Leavit & Hoover Co. by J. W. Hoover."

While both of these documents, particularly the latter

of November 14th, are undoubtedly in some respects self-serving

and hence not admissible for the purpose of binding defendant (Plaintiff

v. Hoover, 148 Ill. App. 3d 100; Galt v. Leavit & Hoover, 100 Ill. App. 3d 111

v. Pratt, 20 Ill. App. 3d 112), we think they are so closely connected with

the subject matter of the present lease that for the purpose of

indicating the services actually performed on the part of Plaintiff,

the court did not err in receiving the same in evidence. Hill v.

Carson, 177 Ill. App. 3d 114; Leavit v. Leavit, 100 Ill. App. 3d 114;

Boyd v. Virginia Hotel Co., 184 Ill. App. 3d 114.

The controlling question, however, between the parties

arises out of the contention of defendant, and in view of the subject

matter the duty of the broker was to bring the parties to the transaction together and that the minds of the principals must meet and agree not only upon the cardinal points but also upon all terms and conditions of the proposed lease and the covenants and agreements therein contained. Plaintiff, on the other hand, contends that the broker was obligated only to procure for defendant a lessee who was ready, willing and able to enter into the 99-year lease upon the terms and conditions provided by defendant and that plaintiff was therefore entitled to a commission even though no lease or binding contract for a lease was executed. Each of the parties cites cases which it is claimed sustain the respective contentions. Defendant relies on Wilson v. Mason, 158 Ill. 304; Lawrence v. Rhodes, 188 Ill. 96; Oliver v. Sattler, 235 Ill. 537; Davis v. Gottschalk, 141 N. Y. Supp. 518. Plaintiff relies on Hersher v. Wells, 103 Ill. App. 418; Rushkiewicz v. St. George, 226 Ill. App. 310; Glatt v. Adams, 226 Ill. App. 321; Lucas v. Schwartz, 243 Ill. App. 418.

Without undertaking to review these cases at length, we do not think that they express materially divergent views upon the proposition of when a broker is and when he is not entitled to a commission. In the first instance, as all these cases hold, it must depend upon the actual contract made between the parties. If the owner of premises lists the same with a broker and requests that the broker produce a party who will either lease or buy upon certain express terms fully stated, and if the broker within the time limited produces such a party, ready, able and willing to lease or buy upon the express terms authorized, the broker is undoubtedly entitled to his commission, unless there is an express contract to the contrary. The owner can not deprive the broker of just compensation by refusing to sell or lease when a customer complying in every respect with his stated terms has been produced. Neither would the fact that after entering into a contract the purchaser or lessee

might refuse to perform, excuse the owner from paying the commission earned. On the other hand, although a contract might be entered into, if it should later develop that as a result of the incapacity financially or otherwise of the party produced it was impossible to enforce the contract, the broker would have failed in one of the essential things necessary for him to do and his commission would not be earned.

The facts in this case in brief are that defendant was the owner of the property which he proposed to lease; that it was improved by a building and that he was in possession of a part of the same. Plaintiff had acted as his agent in securing tenants, and plaintiff proposed to defendant, or vice versa (it is immaterial which) that plaintiff should obtain a customer for a 99-year lease of the property. A number of ^{plaintiff's} employees testified in great detail to the effect that defendant was told in the beginning that he would have to pay a commission. This is denied by defendant, who on the contrary testified just as specifically that he said to them that under no circumstances would he pay the commission. If the case turned upon a question of veracity between these witnesses it might be regarded as settled by the verdict of the jury contrary to defendant's contention. A much more significant fact appears. An examination of the evidence discloses that the terms of the 99-year lease which plaintiff was to secure were not agreed upon either at the time of employment or afterwards. The witnesses for plaintiff (all of whom appear to be very much interested) do not testify that any such terms were agreed upon further than that the lease should be for the term of 99 years, and that the rent reserved to defendant was stated. Thus most material and substantial matters concerning the lease were left without any agreement or understanding whatsoever between the plaintiff broker and his customer. Later, according to testimony submitted by plaintiff,

might refuse to perform, excuse the owner from paying the commission earned. On the other hand, although a contract might be entered into, it is should later develop that as a result of the incapacity financially or otherwise of the party produced it was impossible to enforce the contract, the broker would have failed in one of the essential things necessary for him to do and his commission would not be earned.

The facts in this case in brief are that defendant was the owner of the property which he proposed to lease; that it was improved by a building and that he was in possession of a part of the same. Plaintiff had acted as his agent in securing tenants and plaintiff proposed to defendant, or vice versa (it is immaterial which) that plaintiff should obtain a customer for a 99-year lease of the property. A number of employees testified in great detail to the effect that defendant was told in the beginning that he would have to pay a commission. This is denied by defendant, who on the contrary testified that as specifically that he said to them that under no circumstances would he pay the commission. If the case turned upon a question of veracity between these witnesses it might be regarded as settled by the verdict of the jury contrary to defendant's contention. A man were significant fact appears. An examination of the evidence discloses that the terms of the 99-year lease which plaintiff was to secure were not agreed upon either at the time of employment or afterwards. The witnesses for plaintiff (all of whom appear to be very much interested) do not testify that any such terms were agreed upon further than that the lease should be for the term of 99 years, and that the rent received to defendant was stated. This most material and substantial matters concerning the lease were left without any agreement or understanding whatever between the plaintiff broker and his customer. Later, according to testimony submitted by plaintiff,

its salesman Marcus found a prospective tenant, Milton H. Callner, and on the next day Rovner, another salesman for plaintiff, called on defendant and told him that Callner had offered to take the lease and to pay the annual net rental of \$10,000 a year for the first twenty years and \$12,000 a year for the remaining seventy-nine years. Defendant was not satisfied, and Marcus again took the matter up with Callner. Callner finally proposed that he would pay \$10,000 a year for ten years and \$12,000 a year for eighty-nine years, and the salesmen of plaintiff informed defendant of this offer. They say that defendant expressed his satisfaction but inquired what kind of a building Callner expected to erect and was informed that it was to be a two-story building. Defendant then told them, as they say, to go ahead with the deal and to arrange for a meeting with Callner, at which time other terms might be thrashed out, and pursuant to that proposal a meeting was held on November 12, 1928, in Callner's office. Witnesses for plaintiff testify that Callner at that time said he was willing to enter into a lease of the property for 99 years and to pay a rental of \$10,000 a year for ten years and \$12,000 a year for the remaining eighty-nine years of the term; that Callner said that he would erect a two-story commercial building, covering the entire lot, with an 8½ foot basement and a 13 foot ceiling for the first floor, and that defendant said, "That is all right with me." They testify that Callner asked when he could get possession of the property, stating that this was important because he had a certain tenant in mind, and that defendant replied he could get possession by the following May. Leviton, who acted as defendant's attorney, was present, and plaintiff's testimony is to the effect that Leviton asked Callner who should be designated as the lessee, to which Callner replied that he would take title in the name of a corporation; that Leviton then asked Callner what security would be given for the payment of the rent,

its salesman learned a prospective tenant, Milton E. Caliner, and on the next day Caliner, another salesman for plaintiff, called on defendant and told him that Caliner had offered to take the lease and to pay the annual net rental of \$10,000 a year for the first twenty years and \$12,000 a year for the remaining seventy-nine years. Defendant was not satisfied, and Warner again took matters up with Caliner. Caliner finally proposed that he would pay \$10,000 a year for ten years and \$12,000 a year for eighty-nine years, and the salesman of plaintiff informed defendant of this offer. They say that defendant expressed his satisfaction and indicated what kind of a building Caliner expected to erect and was informed that it was to be a two-story building. Defendant then told them, as they say, to go ahead with the deal and to arrange for a meeting with Caliner, at which time other terms might be thrashed out, and pursuant to that proposal a meeting was held on November 12, 1930, in Caliner's office. Witnesses for plaintiff testify that Caliner at that time said he was willing to enter into a lease of the property for 99 years and to pay a rental of \$10,000 a year for the first twenty years and \$12,000 a year for the remaining eighty-nine years of the term; that Caliner said that he would erect a two-story commercial building, covering the entire lot, with an 8-foot basement and a 12-foot ceiling for the first floor, and that defendant said, "What is all right with me." They testify that Caliner asked when he could get possession of the property, stating that this was important because he had a certain tenant in mind, and that defendant replied he could get possession by the following day. Newton, who acted as defendant's attorney, was present, and plaintiff's testimony is to the effect that Newton asked Caliner who would be designated as the lessee, to which Caliner replied that he would take title in the name of a corporation; that Newton then asked Caliner what security would be given for the payment of the rent.

and that Callner agreed to deposit \$50,000 in cash for that purpose. Plaintiff's witnesses further testify that the cost of the proposed building was discussed and the time when it should be built; that it was agreed that it should be built within five years and should cost from \$75,000 to \$100,000, and that when the building was erected the \$50,000 should be returned to Callner; that the building itself would stand as security. They further say that it was agreed that Callner on depositing the \$50,000 was to have the option of designating whomsoever he pleased as the lessee; that it was proposed and agreed that the rental should be paid semi-annually and that the lessee would pay all expenses in connection with the property, such as janitor services, heat, taxes, insurance and repairs of the building; that that clause should be in the lease.

They testify further that after the terms of the lease had been thrashed out Callner said: "We have a deal presently closed," and instructed Leviton, defendant's attorney, to call his (Callner's) attorney and draw up the lease; that Callner said, "The deal is made and our attorneys will call us up and we will have to sign it;" that defendant replied, "That is all right; the deal is closed as far as the deal is concerned," and that as the parties left the meeting Leviton told Rovner to call him the following day and he would inform Rovner the time of the appointment with Callner's attorney; that on the following day Rovner and Marcus called at Leviton's office; that Leviton then told him that he wanted to be sure that the terms of the lease were clear to the various parties, that he wished to have them in writing; that thereupon Rovner wrote down the terms which Leviton dictated to him; that Leviton then said, "Now, I wish you would submit these points to Mr. Callner in writing so he will understand perfectly what the terms are;" that on the same day Marcus wrote the letter to Callner, plaintiff's exhibit 6, putting in the letter the exact terms, as it is said, which Rovner

and that Caliner agreed to deposit \$50,000 in cash for that purpose. Plaintiff's witnesses further testify that the cost of the proposed building was discussed and the time when it should be built; that it was agreed that it should be built within five years and enough cost from \$75,000 to \$100,000, and that when the building was erected the \$50,000 should be returned to Caliner; that the building itself

would stand as security. They further say that it was agreed that Caliner on depositing the \$50,000 was to have the option of designing, however he pleased as the lessee; that it was proposed and agreed that the rental should be paid semi-annually and that the lessee would pay all expenses in connection with the property, such as janitor services, heat, taxes, insurance and repairs of the building; that that clause should be in the lease.

They testify further that after the terms of the lease had been furnished to Caliner said: "I have a deal presently closed," and instructed Devlin, defendant's attorney, to call his (Calinor's) attorney and draw up the lease; that Caliner said, "The deal is made and our attorneys will call us up and we will have to sign it;" that defendant replied, "That is all right; the deal is closed as far as the deal is concerned," and that on the parties left the meeting Devlin told power to call him the following day and he would inform power the time of the appointment with Caliner's attorney; that on the following day power and Devlin called at Devlin's office; that Devlin then told him that he wanted to be sure that the terms of the lease were clear to the various parties, that he wished to have them in writing; that Christopher Power rose down the terms which Devlin dictated to him; that Devlin then said, "Now, I wish you would submit these points to Mr. Caliner in writing so he will understand perfectly what the terms are;" that on the same day Power wrote the letter to Caliner, Plaintiff's exhibit 6, putting in the letter the exact terms, as it is said, which Power

had written down at Leviton's request, and personally delivered the letter to Callner. The evidence of plaintiff is further to the effect that on the next day Rovner called at defendant's office and told him what he had done; that defendant told him to meet his attorney that afternoon at three o'clock and that he would know what to do; that Rovner and Marcus called at Leviton's office that afternoon and asked whether an appointment had been made for the purpose of drawing the lease; that Leviton replied that before he would make an appointment with Callner's attorney for the purpose of drawing the lease he wanted Rovner to take up the matter of commission with defendant; that Rovner said he did not believe ^{this} ~~it~~ was necessary; that plaintiff was to have a commission; that, however, when Leviton persisted in his request, Rovner wrote the letter to defendant which appears as plaintiff's exhibit 2; that after informing defendant that Leviton refused to make an appointment with Callner's attorney until plaintiff settled the matter of commission, Rovner expressed his surprise and stated there was no question to be settled on this matter and urged defendant to proceed with the execution of the lease without delay; that defendant did not answer the letter and when on the following day Marcus and Rovner called on Leviton, Leviton told them he had nothing to say concerning the lease and that he didn't want to be bothered with it any more; that Rovner called defendant from Leviton's office and told him that Leviton had said he would have nothing more to do with the lease; that defendant replied he would go through with the lease but would not pay any commission, and that this statement was repeated on several occasions.

This evidence as to the commission is denied by the witnesses for defendant, but if it were all assumed to be true it falls far short of proof, in our opinion, that the terms upon which defendant would enter into a 99-year lease were ever agreed upon either between defendant and his broker or between defendant and the

had written down at Leviton's request, and personally delivered the letter to Caliner. The evidence of plaintiff is further to the effect that on the next day Hovner called at defendant's office and told him what he had done; that defendant told him to meet him at-
 torney that afternoon at three o'clock and that he would know what to do; that Hovner and Marcus called at Leviton's office that afternoon and asked whether an appointment had been made for the purpose of drawing the lease; that Leviton replied that before he would make an appointment with Caliner's attorney for the purpose of drawing the lease he wanted Hovner to take up the matter of commission with defendant; that Hovner said he did not believe it was necessary; that plaintiff was to have a commission; that, however, when Leviton persisted in his request, Hovner wrote the letter to defendant which appears as plaintiff's exhibit 2; that after informing defendant that Leviton refused to make an appointment with Caliner's attorney until plaintiff settled the matter of commission, Hovner expressed his surprise and stated there was no question to be settled on this matter and urged defendant to proceed with the execution of the lease without delay; that defendant did not answer the letter and when on the following day Marcus and Hovner called on Leviton, Leviton told them he had nothing to say concerning the lease and that he didn't want to be bothered with it any more; that Hovner called defendant from Leviton's office and told him that Leviton had said he would have nothing more to do with the lease; that defendant replied he would go through with the lease but would not pay any commission, and that this statement was repeated on several occasions.

This evidence as to the commission is denied by the witnesses for defendant, but it is assumed to be true in this for short of proof, in our opinion, that the terms upon which defendant would enter into a 25-year lease were agreed upon either between defendant and his broker or between defendant and the

proposed tenant. The vagueness and indefiniteness that existed in regard to matters concerning which an agreement was necessary appear clearly when we consider the writings introduced in evidence by plaintiff as exhibits 2 and 6. The statement to Mr. Callner, dated November 13, 1928, says "\$50,000 security on lease." But what kind of security and on what terms? Another part of that statement sets up with reference to the proposed building that it shall have a basement 8½ feet from the ground to the ceiling covering the entire lot; that the building shall be not less than two stories and that the second story shall be at least 13 feet in height; but the plans and specifications, it was expressly provided, must be approved by the lessor. What kind of a building was it to be? Out of what sort of material was it to be constructed? All of these things were left wholly indefinite. Under the fourth item of the statement, certain indemnities in favor of the lessor should be provided in the event the building was not constructed within five years. But what indemnities? The letter of the following day to defendant, which appears as plaintiff's exhibit 2, is likewise indefinite. In fact it states:

"After seeing you this morning we followed your suggestion and called Mr. Leviton, telling him that you advised us to ask him to make arrangements to meet Mr. Callner's lawyers for the purpose of drawing up the lease."

It certainly cannot be claimed that a final and definite agreement had been reached when as a matter of fact the whole matter had been referred to the lawyers for the express purpose of drawing up the lease. Plaintiff's witness, Rovner, said:

"I wouldn't say all the terms of this million dollar deal and its conditions were settled and agreed upon, because Mr. Callner told Mr. Leviton to arrange for a meeting and Mr. Sonnenschein to draw the lease. There must have been some other things to be brought up and agreed upon."

And Marcus testified:

"Before I call up Sonnenschein for an appointment and drawing up the lease, I want the terms we discussed at Callner's

proposed tenant. The witnesses and information that related in regard to matters concerning which an agreement was necessarily required to be made when we consider the writings introduced in evidence by plaintiff as exhibits 1 and 6. The statement to Mr. Gallner, dated November 11, 1928, says "150,000 recently on lease." But what kind of security and on what terms? Another part of that statement sets up with reference to the proposed building that it shall have a basement 8 1/2 feet from the ground to the ceiling covering the entire lot; that the building shall be not less than two stories and that the second story shall be at least 13 feet in height; but the plans and specifications, it was expressly provided, must be approved by the lessor. What kind of a building was it to be? Out of what sort of material was it to be constructed? All of these things were left wholly indefinite. Under the fourth item of the statement, certain indemnities in favor of the lessor should be provided in the event the building was not completed within five years. But what indemnities? The latter of the following day to defendant, which appears as plaintiff's exhibit 2, is likewise indefinite. In fact it states:

"After seeing you this morning we followed your suggestion and called Mr. Devitor, telling him that you advised us to ask him to make arrangements to meet Mr. Gallner's lawyers for the purpose of drawing up the lease."

It certainly cannot be claimed that a final and definite agreement had been reached when as a matter of fact the whole matter had been referred to the lawyers for the express purpose of drawing up the lease. Plaintiff's witness, however, said:

"I wouldn't say all the terms of this million dollar deal and its conditions were settled and agreed upon, because Mr. Gallner told Mr. Devitor to arrange for a meeting with Mr. Devitor to draw the lease. There must have been some other things to be brought up and agreed upon."

And various testified:

"Before I call up Sonnenschein for an appointment and draw up the lease, I want the terms we discussed at Gallner's

office down in writing and bring this to Callner, so that it will be clear to him."

Indeed, the evidence submitted for plaintiff shows that the proceedings with reference to the lease were merely in a state of negotiation and that there is not a scintilla of evidence from which any jury could reasonably find that defendant stated the terms with reference to the lease with which the proposed lessee procured by plaintiff was willing to comply. In Migneault v. Gunther, 171 Ill. App. 311, the plaintiff, a broker, sued for commissions alleged to have been earned in connection with the negotiation of a 99-year lease. Plaintiff expressly stipulated that commissions were to be paid only when the proposed deal went through. The lease was not in fact executed, but plaintiff produced a customer who it was claimed was ready, willing and able to execute a lease on the terms claimed to have been stated by the defendant to the plaintiff. These terms covered the amount of the rental and the price to be paid for the improvements that were on the premises. A sale of the business then carried on by the defendant on the premises it was agreed was to constitute a part of the proposed deal, but none of the terms of that part of the transaction was discussed. The plaintiff contended that when he secured a party ready, willing and able to execute a 99-year lease and to pay the amount of the rental which had been agreed on and the price which had been stated for the improvements, he was entitled to his commission, notwithstanding the fact that no lease was executed and that the parties were unable to reach an agreement upon the remaining provisions. On the other hand, the defendant contended that it was necessary for plaintiff to show that the parties executed the lease or entered into a binding contract to do so. Both parties testified that they expected a formal lease to be drawn which would provide for many things, and that they were not familiar with such leases and left the remaining provisions to their

office down in writing and bring this to Calhoun, so that it will be clear to him."

Indeed, the evidence submitted for plaintiff shows that

the proceedings with reference to the lease were merely in a state of negotiation and that there is not a scintilla of evidence from which any jury could reasonably find that defendant acted the terms with reference to the lease with which the proposed lease procured

by plaintiff was willing to comply. In Winnipeg v. Gauthier, 171 Ill. App. 311, the plaintiff, a broker, sued for commissions alleged to have been earned in connection with the negotiation of a 99-year

lease. Plaintiff expressly stipulated that commissions were to be paid only when the proposed deal went through. The lease was not in fact executed, but plaintiff produced a customer who it was claimed was ready, willing and able to execute a lease on the terms claimed to have been stated by the defendant to the plaintiff. These terms

covered the amount of the rental and the price to be paid for the improvements that were on the premises. A sale of the business then carried on by the defendant on the premises it was agreed was to constitute a part of the proposed deal, but none of the terms of that part of the transaction was discussed. The plaintiff contended

that when he executed a party ready, willing and able to execute a 99-year lease and to pay the amount of the rental which had been agreed on and the price which had been stated for the improvements, he was entitled to his commission, notwithstanding the fact that no

lease was executed and that the parties were unable to reach an agreement upon the remaining provisions. On the other hand, the de-

fendant contended that it was necessary for plaintiff to show that the parties executed the lease or entered into a binding contract to do so. Both parties testified that they executed a formal lease to be drawn which would provide for many things, and that they were not familiar with such leases and left the remaining provisions to their

attorneys. They consulted with their respective attorneys and gave directions to prepare the lease. A tentative draft of the lease was presented by the attorney for one of the parties to the attorney for the other, and afterwards a conference was held to discuss the various points of difference between the parties. The conference ended in a disagreement. Afterwards amendments and additions were prepared by one of the attorneys and submitted to the other and conferences were held, but the parties never adjusted their differences and negotiations were finally definitely abandoned. There was testimony to the effect that the proposed lessee had agreed to all the clauses except one, and that this clause had been first submitted in an amendment. The defendant contended that this claim was against the preponderance of the evidence. The opinion states:

"But whether the clause was first submitted by the amendments is immaterial, since the former draft had not been agreed to or accepted, and the parties were only in negotiation on either side, and were at liberty to withdraw, retract or change their positions."

It further says:

"In our opinion the appellant did not earn the commission sued for, for the reason that no binding contract was executed between his client and the defendant, appellee. It is an undisputed fact in the case that appellee, the owner of the premises, at the time of the employment by him of appellant, expressly stipulated that he would pay no commission unless the deal went through."

After citing Wilson v. Mason, 158 Ill. 304, and Fox v. Ryan, 240 Ill. 391, the court further said:

"The above authorities show conclusively that where it is a condition of the employment that a sale be made or a deal be effected, that condition must be complied with before the broker earns his commission; and that to comply with that condition it is necessary that a binding and enforceable agreement be entered into between the parties.*** The evidence shows that the parties failed to come to any agreement as to the terms of the lease, other than the rental to be paid, the length of the term, and that defendant's stock was to be purchased at a discount from the regular price."

The court quoted with approval from Rossiter v. Miller, 3d App. Cases,

attorneys. They consulted with their respective attorneys and gave directions to prepare the lease. A tentative draft of the lease was presented by the attorney for one of the parties to the attorney for the other, and afterwards a conference was held to discuss the various points of difference between the parties. The conference ended in a disagreement. Afterwards amendments and additions were prepared by one of the attorneys and submitted to the other and conferences were held, but the parties never adjusted their differences and negotiations were finally definitely abandoned. There was testimony to the effect that the proposed lease had agreed to all the clauses except one, and that this clause had been first submitted in an amendment. The defendant contended that this claim was against the preponderance of the evidence. The

opinion stated:

"That whether the claim was first accepted by the defendant is immaterial, since the latter draft had not been agreed to or accepted, and the parties were only in negotiation on either side, and were at liberty to withdraw, retract or change their positions."

It further says:

"In our opinion the appellant did not earn the commission sued for, for the reason that no binding contract was executed between his client and the defendant, appellant. It is an undisputed fact in the case that appellant, the owner of the premises, at the time of the employment by him of appellant, expressly stipulated that he would pay no commission unless the deal went through."

After citing Wilson v. Kahan, 133 Ill. 204, and Box v. Ryan, 240

Ill. 321, the court further said:

"The above authorities show conclusively that where it is a condition of the employment that a sale be made or a deal be effected, that condition must be complied with before the broker earns his commission; and that to comply with that condition it is necessary that a binding and irrevocable agreement be entered into between the parties. The evidence shows that the parties failed to come to any agreement as to the terms of the lease, other than the rental to be paid, the length of the term, and that defendant's stock was to be purchased at a discount from the market price."

The court quoted with approval from Bohler v. Miller, 34 App. Cases,

p. 1151, where Lord Blackburn said:

"So long as they are only in negotiation, either party may retract; and though parties may have agreed upon all of the cardinal points of the intended contract, yet, if some particular essential of the agreement still remains to be settled afterward, there is no contract. The parties in such a case are still only in negotiation."

In this case the evidence disclosing that the terms of the proposed lease were not agreed to by the broker and the owner in advance, we hold it was the intention of the parties that the broker should submit a customer who would enter into a lease upon such terms and conditions as were agreeable to defendant. They did not do so. No binding contract was entered into, and the verdict of the jury in favor of plaintiff is in this respect clearly and manifestly against the law and the evidence.

The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

19. 1931, where Lord Macpherson said:

"So long as they are only in negotiation, either party may retract; and though parties may have agreed upon all of the essential points of the intended contract, yet, if some particular essential of the agreement still remains to be settled afterwards, there is no contract. The parties in such a case are still only in negotiation."

In this case the evidence discloses that the terms

of the proposed lease were not agreed to by the broker and the owner in advance, we hold it was the intention of the parties that the broker should submit a customer who would enter into a lease upon such terms and conditions as were agreeable to the landlord. They did not do so. No binding contract was entered into, and the verdict of the jury in favor of plaintiff is in this respect entirely and manifestly against the law and the evidence. The judgment is therefore reversed and the cause

remanded.

REVEREND AND HONORABLE

O'Connor and McGee, JJ., concur.

34807

PHILIP BIRNBAUM,
Appellant,

vs.

HUGO GERSCHAFKE,
Appellee.

507
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

260 I.A. 619²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On August 1, 1930, at the July term of the Circuit court, in an action in assumpsit the plea of defendant was stricken, his default taken and a judgment in favor of plaintiff and against defendant for the sum of \$1,000 entered. On September 17, 1930, at the September term, defendant gave notice to plaintiff that on the following day he would move the court to vacate the judgment and for leave to file an affidavit and pleas, and on September 26th the motion was granted.

Plaintiff prosecutes this appeal to reverse that order and contends that the court was wholly without jurisdiction to vacate and set aside a judgment rendered at a previous term.

The record discloses that plaintiff began his suit by the filing of a praecipe on May 3, 1930; that on that day a summons issued returnable to the May term of said court; that defendant was duly served by the sheriff on May 3rd; that on May 14th thereafter defendant filed his appearance in the case; that on June 4th the plaintiff filed a declaration in assumpsit, in which he averred that on February 24, 1930, defendant was the owner of a certain parcel of real estate on which there was a brick cottage, with garage in the rear; that on that date defendant made an oral lease of the same to plaintiff, demising it for a period of four months commencing May 1, 1930, and by the oral lease agreed that he would deliver up possession of the premises to plaintiff May 1st; that

PHILIP BISHOP,
Appellant,
vs.
HUGO KERNSTADT,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2001 A. 619

MR. JUSTICE JUSTICE REPORT
DELIVERED THE OPINION OF THE COURT.

On August 1, 1930, at the City Court of the District
Court, in an action in assumpsit the plea of defendant was entered,
his default taken and a judgment in favor of plaintiff and against
defendant for the sum of \$1,000 entered. On September 17, 1930,
at the September term, defendant gave notice to plaintiff that on
the following day he would move the court to vacate the judgment
and for leave to file an affidavit and plea, and on September 28th
the motion was granted.

Plaintiff procured this appeal to reverse that order
and contends that the court was wholly without jurisdiction to vacate
and set aside a judgment rendered at a previous term.

The record discloses that plaintiff began his suit by
the filing of a complaint on May 7, 1930; that on June 1st a summons
issued returnable to the day set of said court; that defendant was
duly served by the sheriff on May 2nd; that on May 1st thereafter
defendant filed his appearance in the case; that on June 4th the
plaintiff filed a declaration in assumpsit, in which he averred
that on February 24, 1930, defendant was the owner of a certain
parcel of real estate on which there was a prior mortgage, with
garage in the rear; that on that date defendant made an oral lease
of the same to plaintiff, lasting for a period of four months
commencing May 1, 1930, and by the oral lease agreed that he would
deliver up possession of the premises to plaintiff on May 1st; that

the rent reserved was \$65 a month; that upon making the lease plaintiff paid to defendant the rent for May but that defendant, disregarding the lease, refused to permit plaintiff to enter and prevented his doing so; that thereby plaintiff was damaged, in that in anticipation of occupying these premises he had cancelled his lease to other premises in Chicago by paying \$100 for the privilege of cancelling; that he was therefore without a place in which to live, was compelled to store his furniture and to take up his residence in a hotel and was otherwise put to great and unusual expense to the damage of \$1000. Attached to the declaration was an affidavit of plaintiff to the effect -

"***that the above action is an action for a breach of contract and for the recovery of money only and the nature of plaintiff's claim is damages proximately sustained by reason of the breach by the defendant of a certain contract of leasing theretofore entered into with the plaintiff, as is more specifically set forth in the foregoing declaration; that there is now due to the plaintiff from the defendant, after allowing the defendant all his just credits, deductions and set-offs, the sum of One Thousand (\$1000.00) Dollars."

On June 20th and at the June term of the court, defendant filed a plea of the general issue, but no affidavit of merits. On August 1, 1930, without any notice to defendant, on motion of plaintiff's attorney, the plea was "stricken for want of an affidavit of merits," the default of defendant taken and judgment entered as hereinbefore recited. At the September term of the court this judgment was vacated and set aside and leave given to defendant to plead, and it is from this order that this appeal is prosecuted.

In support of his motion to set aside the judgment defendant filed his petition in which he represented to the court that the judgment of August 1st was void, in that the court did not have jurisdiction over the subject matter and parties, judgment having been entered during the vacation period, when no matters except those in which an emergency existed were to be heard by the court;

the rent reserved was \$65 a month; that upon making the lease plaintiff paid to defendant the rent for May but that defendant, disregarding the lease, refused to permit plaintiff to enter and prevented his doing so; that thereby plaintiff was damaged, in that in anticipation of occupying these premises he had cancelled his lease to other premises in Chicago by paying \$100 for the privilege of cancelling; that he was therefore without a place in which to live, was compelled to store his furniture and to take up his residence in a hotel and was otherwise out to great and unusual expense to the damage of \$1000. Appeared to the defendant was an affidavit of plaintiff to the effect -

"That the above action is an action for a breach of contract and for the recovery of money only and the nature of plaintiff's claim is damages proximately sustained by reason of the breach by the defendant of a certain contract of leasing premises entered into with the plaintiff, as is more specifically set forth in the foregoing declaration; that there is now due to the plaintiff from the defendant, after allowing the defendant all his just credits, deductions and set-offs, the sum of one thousand (\$1000.00) dollars."

On June 20th and at the June term of the court, defendant filed a plea of the general issue, but no affidavit of merits. On August 1, 1930, without any notice to defendant, on motion of plaintiff's attorney, the plea was set aside for want of an affidavit of merits, the denial of defendant taken and judgment entered as hereinbefore recited. At the September term of the court this judgment was vacated and set aside and leave given to defendant to plead, and it is true that this order that this appeal is prosecuted, in support of his motion to set aside the judgment defendant filed his petition in which he represented to the court that the judgment of August last was void, in that the court did not have jurisdiction over the subject matter and parties, judgment having been entered during the vacation period, when no matters except those in which an emergency existed were to be heard by the court;

in that the court assessed damages on plaintiff's affidavit of claim, contrary to the provisions of the statute; in that the cause was not reached for trial on the calendar and no notice was given to defendant of the inquest for assessing damages.

In the first place, it is apparent that the court exceeded its power in striking defendant's plea because there was no affidavit of merits. Section 55 of the Practice act (See Cahill's Ill. Rev. Stats. 1929, chap. 110, p. 2023) provides in substance that if the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due from the defendant, after allowing all just credits, deductions and set-offs, he shall be entitled to judgment in case of default, unless defendant or his agent or attorney shall file with his plea an affidavit, etc. The declaration, the allegations of which we have recited at length, shows clearly that plaintiff was not suing upon any contract, express or implied, for the payment of money; on the contrary his suit was for unliquidated damages growing out of a certain contract for the leasing of premises and he claimed that defendant had violated the provisions of the lease.

In the second place, it is apparent that in entering a judgment without notice, the court disregarded rules 20 and 21 of the Circuit court, of which by statute this court is now required to take judicial notice. These rules are as follows.

"Rule 20 - No motion will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered, except where a party is in default or where the cause is reached on a call of the trial calendar."

"Rule 21. - Where a party is in default, for want of appearance no notice shall be required, except upon the order of the Court."

In this case the appearance of defendant was on file,

in that the court assessed damages on plaintiff's affidavit of claim, contrary to the provisions of the statute; in that the cause was not reached for trial on the calendar and no notice was given to defendant of the issues for answering damages.

In the first place, it is apparent that the court exceeded its power in striking defendant's plea because there

was no affidavit of merits. Section 85 of the Practice Act (see Cahill's Ill. Rev. Stat. 1930, chap. 110, p. 2032) provides

in substance that if the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due from the defendant, after allowing all just credits,

deductions and set-offs, he shall be entitled to judgment in case of default, unless defendant or his agent or attorney shall file with his plea an affidavit, etc. The declaration, the allegations of which we have tested at length, shows clearly that plaintiff

was not suing upon any contract, express or implied, for the payment of money; on the contrary his suit was for undischarged taxes growing out of a certain contract for the leasing of premises and he claimed that defendant had violated the provisions of the lease.

In the second place, it is apparent that in entering a judgment without notice, the court disregarded rules 30 and 31

of the Circuit Court, of which by statute this court is now required to take judicial notice. These rules are as follows.

"Rule 30 - No motion will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered, except where a party is in default or where the cause is reached on a writ of the trial calendar."

"Rule 31 - Where a party is in default, for want of appearance no notice shall be required, except upon the order of the Court."

In this case the appearance of defendant was on file.

the plea was on file, no notice was given, and it is apparent that the judgment must have been entered by inadvertence and that if the court had known no notice had been given the judgment would not have been entered. A recent decision of this court has settled the law on this point. Swiercz v. Nalenka, 259 Ill. App. 262.

In that case this court said, concerning rules 20 and 21:

"Construing the two rules together, as we must, we hold that under Rule 20 no order can properly be entered where an appearance is entered without notice, and that since no notice was given to the defendants in the instant case, the default judgment was erroneously entered. Rules of court when entered of record are binding on the courts and become the law of procedure in matters to which they relate when not inconsistent with the statute. Feldott v. Featherstone, 290 Ill. 485."

It is true that the petition filed in this case does not mention section 89 of the Practice act, but the facts which appear of record and which are stated in the petition require the application of that section. This judgment is on its face unjust and was without doubt entered by the court under a mistake of fact.

Plaintiff complains that a rule should have been entered on him to answer the petition or to demur to it. The record, however, discloses that he made a motion to strike the petition, and this made a rule unnecessary, the ^{motion being} \angle in the nature of a demurrer.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

the plea was on file, no notice was given, and it is apparent that the judgment must have been entered by inadvertence and that if the court had known no notice had been given the judgment would not have been entered. A recent decision of this court has settled the law on this point. Belcher v. Belcher, 230 Ill. App. 283.

In that case this court held, concerning rules 30 and 31:

"Considering the two rules together, as we must, we said that under Rule 30 an order can properly be entered where an appearance is entered without notice, and that since no notice was given to the defendant in the instant case, the default judgment was erroneously entered. Rules of court when entered of record are binding on the courts and become the law of procedure in matters in which they relate and are not inconsistent with the statute. Belcher v. Belcher, 230 Ill. App. 283."

It is true that the petition filed in this case does not mention section 30 of the statute and the facts which appear of record and which are stated in the petition require the application of that section. This judgment is on the facts and was without doubt entered by the court under a mistake of fact.

It is respectfully suggested that a rule should have been entered on it to answer the petition or to leave it to the record, however, disclosed that he made a motion to enter the petition, and also made a rule accordingly, the motion being entered on a summary.

For the reasons indicated the judgment of the trial court is affirmed.

affirmed.

O'Connor and Justice, JJ., concur.

51
34851

PENNSYLVANIA TANK LINE,
a New Jersey Corporation,
Appellee,

vs.

LARKIN F. JORDAN, JOHN H. VAN MOSS,
JOSEPH H. McCABE, WILLIAM JERVIS,
WALTER BUSHONG, JOSEPH PRINCE and
FRANK H. REPETTO,

Defendants.

JOSEPH H. McCABE,
(Respondent)
Appellant.

7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 619³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred to this court where the facts are practically identical and where both law and facts have been considered in an Opinion No. 34850 this day filed. For the reasons stated in that opinion, in this cause also the judgment of the trial court will be affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

PENNSYLVANIA TAXE LIME,
a New Jersey Corporation,
Appellee,

vs.

LAMAR V. JORDAN, JOHN H. VAN NOSE,
JOSEPH H. MCCABE, WILLIAM LEMAY,
WALTER HUGHSON, JOSEPH PRINCE and
FRANK E. HENRISTO,
Defendants.

JOSEPH H. MCCABE,
(Respondent)
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

360 I.A. 619

MR. PRESIDING JUDGE WATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred
to this court where the facts are practically identical and where
both law and facts have been considered in an opinion No. 24820
this day filed. For the reasons stated in that opinion, in this
cause also the judgment of the trial court will be affirmed.

AFFIRMED.

McGarity and O'Connor, JJ., concur.

34852

PENNSYLVANIA TANK LINE,
a New Jersey Corporation,
Appellee,

vs.

LARKIN F. JORDAN, JOHN H. VAN MOSS,
JOSEPH H. McCABE, WILLIAM JERVIS,
WALTER BUSHONG, JOSEPH PRINCE and
FRANK H. RNPETTO,
Defendants.

—
JOSEPH H. McCABE,
(Respondent)
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 619⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred to this court where the facts are practically identical and where both law and facts have been considered in an opinion No. 34850 this day filed. For the reasons stated in that opinion, in this cause also the judgment of the trial court will be affirmed.

AFFIRMED.

O'Conner and McSurely, JJ., concur.

PENNSYLVANIA TAKE LINE,
a New Jersey Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

JOHN W. JOHNSON, JOHN R. VAN ROSS,
JOHN R. MCCABE, WILLIAM J. LEWIS,
WALTER BUCHHEIT, JOHN PHILIP and
FRANK W. BRETHERTON,
Defendants.

JOHN W. MCCABE,
(Respondent)
Appellant.

MR. PRESIDING JUSTICE SATCHITT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred
to this court where the facts are practically identical and where
both law and facts have been considered in an opinion No. 24833
this day filed. For the reasons stated in that opinion, in this
cause also the judgment of the trial court will be affirmed.
AFFIRMED.

C'Conner and Kennedy, Pl., counsel.

24833

34853

PENNSYLVANIA TANK LINE,
a New Jersey Corporation,
Appellee.

vs.

LARKIE F. JORDAN, JOHN H. VAN MOSS,
JOSEPH H. McCABE, WILLIAM JERVIS,
WALTER BUSHONG, JOSEPH PRICE and
FRANK H. REPETTO,
Defendants.

JOSEPH H. McCABE,
(Respondent)
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

200 I.A. 619⁵

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred to this court where the facts are practically identical and where both law and facts have been considered in an opinion No. 34850 this day filed. For the reasons stated in that opinion, in this cause also the judgment of the trial court will be affirmed.

AFFIRMED.

O'Conner and McSurely, JJ., concur.

34882

UNIVERSITY PARK LIME,
a New Jersey Corporation,
Appellee.

vs.

LAMAR W. JORDAN, JOHN H. VAN METER,
JOSEPH H. McCARR, WILLIAM J. JARVIS,
WALTER HUGHES, JOSEPH BRINER and
FRANK H. REYNOLDS,
Defendants.

JOSEPH H. McCARR,
(Respondent)
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

34882

MR. PRESIDING JUSTICE McFARLAND
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred
to this court where the facts are practically identical and where
both law and facts have been considered in an opinion No. 34880
this day filed. For the reasons stated in that opinion, in this
cause also the judgment of the trial court will be affirmed.
AFFIRMED.

O'Connor and McFarland, JJ., concur.

34854

52
PENNSYLVANIA TANK-LINE,
a New Jersey Corporation,
Appellee,

vs.

LARKIN F. JORDAN, JOHN H. VAN MOSS,
JOSEPH H. McCABE, WILLIAM JERVIS,
WALTER BUSHONG, JOSEPH PRINCE and
FRANK H. REPETTO,
Defendants.

JOSEPH H. McCABE,
(Respondent)
Appellant.

7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 620

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause is one of five causes which were transferred to this court where the facts are practically identical and where both law and facts have been considered in an Opinion No. 34850 this day filed. For the reasons stated in that opinion, in this cause also the judgment of the trial court will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

PENNSYLVANIA TAX-LINE
a New Jersey Corporation
Appellee

vs.

LARRY E. JOHNSON, JOHN N. VAN BROS,
JOSEPH N. MCCARTER, WILLIAM J. LEVINE,
WALTER EMMONS, JOSEPH BRINCK and
FRANK N. HARTING,
Defendants.

JOSEPH N. MCCARTER,
(Respondent)
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

200 I.A. 630

MR. PRESIDING JUSTICE WATSON
DELIVERED THE OPINION OF THE COURT.

This case is one of five cases which were trans-
ferred to this court where the facts are practically identical
and where both law and facts have been considered in an opinion.
No. 24584 this day filed. For the reasons stated in that opinion,
in this case also the judgment of the trial court will be

affirmed.

ATTESTED.

O'Connor and McGee, Jr., Clerk.

55
34087

PEOPLE OF THE STATE OF ILLINOIS
ex rel. FRANK McGUIRE, Doing
Business under the style and firm
name of the Lorraine Gardens
Dancing School,

Appellee,

vs.

WILLIAM HALE THOMPSON, Mayor of the
City of Chicago, MORRIS ELLER, City
Collector, PATRICK SHERIDAN SMITH,
City Clerk, and WILLIAM F. RUSSELL,
Commissioner of Police of the City
of Chicago,

Appellants.

7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 620²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Petitioner, seeking a writ of mandamus to compel defendants to restore a dance hall license theretofore issued to petitioner but subsequently revoked or to issue a license, after hearing obtained the writ. The respondents appeal from this order. Petitioner does not appear in this court to defend it.

Petitioner alleged that he was a resident and citizen of Chicago, Illinois, and of good moral character; that he owned the leasehold to the premises at number 1527 North Clark street, where he was doing business under the name of Lorraine Gardens Dancing School; that he at no time violated any laws and has complied with all the ordinances and requirements regulating the application for licenses; that a license was issued to him January 1, 1929, but subsequently, on September 16, 1929, said license was revoked.

The respondents answered, denying that petitioner is a resident and citizen of the city, county and state, and deny that he is a person of good moral character; deny that he at no time violated any of the laws of the land; admit that a license was issued which was subsequently revoked. The answer further averred that petitioner hired and permitted to congregate upon his premises

PEOPLE OF THE STATE OF ILLINOIS
vs. FRANK McGUIRE, Doing
Business under the style and firm
name of the Lorraine Gardens
Dancing School.

Appellee.

vs.

WILLIAM HALL THOMPSON, Mayor of the
City of Chicago, MARION ELLIS, City
Collector, PATRICK BERNARD SMITH,
City Clerk, and WILLIAM E. HUSKILL,
Commissioner of Police of the City
of Chicago.

Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145
2146
2147
2148
2149
2150
2151
2152
2153
2154
2155
2156
2157
2158
2159
2160
2161
2162
2163
2164
2165
2166
2167
2168
2169
2170
2171
2172
2173
2174
2175
2176
2177
2178
2179
2180
2181
2182
218

immoral women and permitted immoral and suggestive dancing and allowed immoral men and gunmen to frequent and patronize the dance hall; that the character, conduct and use of petitioner's premises are such as to be inimical to the morals of the employees and patrons; that such places are patronized by people of diverse races and hoodlums.

It is unnecessary to narrate in detail the evidence presented. It fully establishes that the place in question was operated immorally; that immoral and suggestive dancing was permitted and that the averments of the relator's answer as to the character of the place were fully proven.

The writ of mandamus is never granted when the right of the petitioner is doubtful, but only where the petitioner has a clear legal right to have done the thing he requests and where there is imposed a clear legal duty upon the respondents to perform the act sought to have performed. People ex rel. Drea v. Hanson, 330 Ill. 79; People ex rel. Dunderdale v. City, 327 Ill. 62; People v. Board of Review, 326 Ill. 124; Murphy v. City of Park Ridge, 298 Ill. 66. The revocation of the license in question was within the discretion of the Mayor of the City of Chicago, and the writ of mandamus will not issue to control this discretion unless it is shown that he acted fraudulently or corruptly. People v. Webb, 256 Ill. 364; People v. Henry, 236 Ill. 124. Mandamus will not lie to compel the mayor to grant a license where a former license was revoked for good cause. Harrison v. People ex rel. Stern, 121 Ill.App. 189. The court will not sit in judgment upon the exercise of the mayor's functions unless such functions are arbitrarily or capriciously exercised. People ex rel. Gary v. Thompson, No. 33109 Appellate Court, opinion filed May 31, 1929; People ex rel. Sachs v. Dever, 240 Ill. App. 669; People v. Henry, 236 Ill. 124.

immoral women and permitted immoral and suggestive dancing and allowed immoral men and women to frequent and patronize the dance hall; that the character, conduct and use of petitioner's premises are such as to be inimical to the morals of the employees and patrons; that such places are patronized by people of diverse races and nationalities.

It is unnecessary to narrate in detail the evidence presented. It fully establishes that the place in question was operated immorally; that immoral and suggestive dancing was permitted and that the statements of the petitioner's answer as to the character of the place were fully proven.

The writ of mandamus is never granted when the right

of the petitioner is doubtful, but only where the petitioner has a

clear legal right to have done the thing he requests and where

there is imposed a clear legal duty upon the respondents to perform

the act sought to have performed. People ex rel. Rice v. Hanson, 255

350 Ill. 70; People ex rel. Linderthal v. City, 287 Ill. 62; People

v. Board of Review, 302 Ill. 124; Barney v. City of Cook County, 295

Ill. 90. The revocation of the license in question was within the

discretion of the mayor of the City of Chicago, and the writ of

mandamus will not issue to compel said discretion unless it is

shown that he acted fraudulently or corruptly. People v. Webb, 250

Ill. 364; People v. Barry, 255 Ill. 124. Mandamus will not lie to

compel the mayor to grant a license where a former license was re-

voked for good cause. Harrison v. People ex rel. Barry, 181 Ill. App.

199. The court will not sit in judgment upon the exercise of the

mayor's discretion unless such functions are arbitrarily or corruptly

exercised. People ex rel. Barry v. Thompson, 203 Ill. App.

Appellate Court, opinion filed May 31, 1920; People ex rel. Barry

v. Mayor, 240 Ill. App. 650; People v. Barry, 255 Ill. 124.

Applying these well established rules it follows that the petitioner was not entitled to the writ of mandamus. The dances permitted at the place were shameless and unclean. For the reasons indicated the order awarding the writ is reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

Applying these well established rules it follows
 that the petitioner was not entitled to the writ of habeas corpus.
 The reasons permitted at the time were sufficient and adequate.
 For the reasons indicated the order awarding the writ is reversed.
 (REVERSED)

Walter, J., and O'Connor, J., concur.

34405

56
WALTER E. MAZE, Administrator of the
Estate of Virginia R. Maze, Deceased,
Appellant,

vs.

ARTHUR T. McINTOSH, Doing Business
as Arthur T. McIntosh & Company,
Appellee.

17
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

200 I.A. 620³

MR. JUSTICE McSURELY
DELIVERED THE SUPPLEMENTAL OPINION OF THE COURT UPON REHEARING.

Petition for rehearing having been granted and answer thereto having been filed, we have reconsidered this case and have come to the conclusion that we were in error in holding, as we did in our original opinion, that the minute made by the clerk was a sufficient compliance with Rule 3 of the Superior court.

Examining closely the photographic copy of the entry, it more clearly than anything else appears thus: "Prae Deder & C." In our original opinion we read this otherwise and said this would be sufficient to advise anyone familiar with the keeping of records that a declaration had been filed. While we adhere to this conclusion, yet we are disposed to think that the experience or familiarity of the examiner is not the true test. The young man who examined the register was a graduate of the University of Illinois and had studied in a Chicago law school for a year and a half, so that we must assume that he was at least of average intelligence, but evidently he was not familiar with the abbreviated forms in which the entries were made. As is well known, the clerks of court have a jargon of their own which they use for making such entries. To one who is familiar with this the words or letters used are ordinarily intelligible, but to one not familiar they often convey no meaning. Pressed to its limit our first decision would involve the proposition that the use of any hieroglyphics which through the experience of the examiner are made to divulge their meaning would be a sufficient

WALTER E. WALKER, Administrator of the
Estate of Virginia A. Walker, deceased,
Appellant.

vs.

ARTHUR L. KELLER, Deceased
as ARTHUR L. KELLER & COMPANY,
Appellee.

COURT OF BOON COUNTY.

320 A. 320

DELIVERED THE SUPPLEMENTAL OPINION OF THE COURT UPON REHEARING.

Petition for rehearing having been granted and answer thereto having been filed, we have reconsidered this case and have come to the conclusion that we were in error in holding, as we did in our original opinion, that the advice made by the clerk was a sufficient compliance with Rule 3 of the Superior Court. Examining closely the photostatic copy of the entry, it more clearly than anything else appears that: "First Peter A. G." In our original opinion we read this otherwise and said this would be sufficient to advise anyone familiar with the keeping of records that a declaration had been filed. While we adhere to this conclusion, yet we are disposed to think that the experience of familiarity of the examiner is not the true test. The young man who examined the register was a graduate of the University of Illinois and had studied in a Chicago law school for a year and a half, so that we must assume that he was at least of average intelligence, but evidently he was not familiar with the abbreviated form in which the entries were made. As is well known, the clerks of courts have a jargon of their own which has not much in common with the entries. To one who is familiar with this the words of letters used are easily intelligible. But to one not familiar they often sound like gibberish. Pressed to the limit our first decision went, involve the proposition that the use of any abbreviations which through the experience of the examiner and made so strange their meaning would be a sufficient

compliance with the rule; that is, an entry in a code would be sufficient if one were skilful enough to decipher it.

Lawyers and judges presumably possess average intelligence and certainly are for the most part experienced and familiar with court records. But there is disagreement between these as to what words and letters appear upon the instant record. This of itself tends to demonstrate their uncertainty and illegibility. The test should not be what we, with our experience as clerks, lawyers and judges, would understand the entry to mean, but what would a law clerk of average intelligence understand.

We think we were in error in saying that the entry in this case was as intelligible as the entry considered in McCord v. Briggs & Turivas, 338 Ill. 158. The rule requires that the entries should be sufficient to identify the papers and it is not sufficient to make entries which are merely the basis for guessing what is meant. This entry was not a sufficient compliance with the rule.

It should be remarked that this was not an instance where the attorneys were indifferent or neglected the case. The young man in their office was on the watch for the filing of a declaration. The misprision of the court clerk in not making the entry legible and intelligible misled him.

For the reasons indicated we are of the opinion that the order of the Superior court vacating the judgment was proper and it is affirmed.

AFFIRMED.

Hatchett, F. J., and O'Conner, J., concur.

compliance with the rule; that is, an entry in a code would be sufficient if one were skillful enough to decipher it.

Lawyers and judges presumably possess average intelli-

gence and certainly are for the most part experienced and familiar with court records. But there is disagreement between them as to what words and letters appear upon the instant record. This of itself tends to demonstrate their uncertainty and illigibility. The test should not be what we, with our experience as clerks, lawyers and judges, would understand the entry to mean, but what would a fair clerk of average intelligence understand.

We think we were in error in saying that the entry in this case was an intelligible as the entry considered in McGowan v. Briggs & Tarver, 338 Ill. 125. The rule requires that the entries should be sufficient to identify the papers and it is not sufficient to make entries which are merely the basis for guessing what is meant. This entry was not a sufficient compliance with the rule.

It should be remarked that this was not an instance where the attorneys were indifferent or neglected the case. The young men in their office was on the watch for the filing of a declaration. The explanation of the court clerk in not making the entry legible and intelligible misled him. For the reasons indicated we are of the opinion that the order of the Superior court vacating the judgment was proper and it is affirmed.

ATTESTED.

Walter H. T. and O'Connor, J., concur.

34405

WALTER E. MAZE, Administrator of
the Estate of VIRGINIA R. MAZE,
Deceased,

Appellant,

vs.

ARTHUR T. McINTOSH, Doing Business
as ARTHUR T. McINTOSH & COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 620^{3A}

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Walter E. Maze, as administrator of the estate of Virginia R. Maze, deceased, who will be hereinafter referred to as plaintiff, seeks to reverse an order of the Superior court of Cook county vacating a judgment for \$10,000 in favor of plaintiff and against defendant, upon motion of defendant made under section 89 of the Practice act.

The record discloses that on October 15, 1929, plaintiff brought an action to recover damages claimed to have been sustained by reason of the defendant wrongfully causing the death of Virginia R. Maze. The amount claimed in the summons and declaration was the maximum that may be recovered in such a case, viz. \$10,000. The declaration was filed on the same day and summons issued returnable to the November term, which commenced on the first Monday of November, 1929. Summons was served on the defendant on October 17, November 20, no appearance having been entered by the defendant, on motion of plaintiff an order was entered defaulting the defendant; on November 29 a jury was impaneled, sworn to assess plaintiff's damages and after hearing plaintiff's evidence, the defendant not being represented, returned a verdict assessing plaintiff's damages at \$10,000. Thereupon judgment was entered upon the verdict. January following an execution was served on the defendant, who immediately took the matter up with his counsel who, on January 14, 1930, filed

WALTER E. KANE, Administrator of the Estate of VIRGINIA E. KANE, Deceased,

Appellant,

vs.

ARTHUR T. KALINOSKI, Doing Business as ARTHUR T. KALINOSKI & COMPANY, Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

2001A 080

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Walter E. Kane, an administrator of the estate of Virginia E. Kane, deceased, who will be hereinafter referred to as plaintiff, seeks to reverse an order of the Superior Court of Cook County vacating a judgment for \$10,000 in favor of plaintiff and against defendant, upon motion of defendant made under section 86 of the Practice Act.

The record discloses that on October 15, 1939, plaintiff brought an action to recover damages claimed to have been sustained by reason of the defendant wrongfully causing the death of Virginia E. Kane. The amount claimed in the summons and declaration was the maximum that may be recovered in such a case, viz. \$10,000. The declaration was filed on the same day and summons issued returnable to the November term, which commenced on the first Monday of November, 1939. Summons was served on the defendant on October 17, November 30, no appearance having been entered by the defendant, on motion of plaintiff an order was entered dismissing the defendant; on November 29 a jury was impaneled, sworn to assess plaintiff's damages and after hearing plaintiff's evidence, the defendant not being represented, returned a verdict assessing plaintiff's damages at \$10,000. Thereupon judgment was entered upon the verdict. January following an execution was served on the defendant, who immediately took the matter up with his counsel who, on January 14, 1939, filed

the motion to vacate the judgment. The motion was supported by affidavits. Plaintiff took issue on the motion by filing his verified answer supported by an affidavit. The matter came on for hearing before the court who heard the evidence and sustained the motion. The defendant was given leave to plead, and it is to reverse this order that plaintiff prosecutes this appeal.

The showing made by the defendant was to the effect that (1) he had a good defense to the suit on its merits; (2) that he was not guilty of any negligence in failing to make his defense, and that his failure to appear and defend was occasioned by the misprision^{of} the clerk of the court in failing to show on the register kept by the court pursuant to rule, that plaintiff had filed his declaration. Rule 3 of the Superior court, upon which the defendant relies is as follows: "Rule 3. The clerk shall keep a law and chancery register, in which shall be noted respectively:

- 'a' The numbers and titles of all causes, petitions, or proceedings, begun in this Court.
- 'b' The names of the respective attorneys, or solicitors, therein.
- 'c' The date and time of day of filing each paper filed in such cause, describing the same as briefly as may be necessary for identification.
- 'd' The date when any paper shall be taken from the files, and to whom delivered."

That the declaration was filed October 15, 1929, is undisputed, but the contention made by defendant is that the minute made by the clerk of the court on the register which was kept pursuant to Rule 3, was unintelligible and that although a representative of defendant examined the register on two occasions, yet he was not advised that a declaration had been filed. And a further point is made that the minute made by the clerk on the register was not in the English language as required by section 18 of the Schedule of the Constitution of the State of Illinois.

the motion to vacate the judgment. The motion was supported by affidavits. Plaintiff took issue on the motion by filing his verified answer supported by an affidavit. The matter came on for hearing before the court who heard the evidence and sustained the motion. The defendant was given leave to plead, and it is so ordered. This order that plaintiff prosecute this appeal.

The showing made by the defendant was to the effect that (1) he had a good defense to the suit on its merits; (2) that he was not guilty of any negligence in failing to make his defense and that his failure to appear and defend was occasioned by the misdirection of the clerk of the court in failing to show on the register kept by the court pursuant to rule, that plaintiff had filed his declaration. Rule 3 of the superior court, upon which the defendant relies is as follows: "While a. The clerk shall keep a law and chancery register, in which shall be noted respectively: 'a' The numbers and titles of all causes, petitions, or proceedings, begun in this court. 'b' The names of the respective attorneys or solicitors therein. 'c' The date and time of day of filing each paper filed in such cause, describing the same as briefly as may be necessary for identification. 'd' The date when any paper shall be taken from the files, and so when delivered."

That the declaration was filed October 15, 1932, is undisputed, but the contention made by defendant is that the minute made by the clerk of the court on the register which was kept pursuant to Rule 3, was untrustworthy and that although a representation of fact was examined the register on two occasions, yet he was not advised that a declaration had been filed. And a further point is made that the minute made by the clerk on the register was not in the English language as required by section 15 of the Schedule of the Constitution of the State of Illinois.

Rules of court when entered of record are binding on the courts and become the law of procedure in matters to which they relate when not inconsistent with the statute. Feldgett v. Featherstone, 290 Ill. 485. The question^{is} therefore whether there was a misprision of the clerk in making a minute on the register of the filing of the declaration. A photostatic copy of the register, so far as it is pertinent here and as well as we are able to reproduce it in this opinion, is as follows:

"Prae Declar & C	10	<u>35</u>	W. A. Morrow	Oct	15	29
Summa			K. J. Owens	Oct	22	29."

Horace G. Marshall, a young man twenty-three years of age, swears that he graduated in 1928 from the University of Illinois, receiving the degree of Bachelor of Arts; that he had studied law in a Chicago law school for one and one-half years; that he was employed by the law firm of Cassels, Potter & Bentley which was retained by defendant to represent him in the instant case; that his duties as such employe included the keeping of an office docket where he docketed all cases; that a few days after October 17th the summons which had been served on defendant was brought by defendant to the office and turned over to him, and that it was his duty to examine the court records and report to a member of the law firm; that when the summons was delivered to him he made an entry in the diary that the declaration in the case was due to be filed on Friday, October 25th, and that between that day and the following Monday "he personally inspected the Register of Law and Chancery cases kept by the clerk of the Superior court of Cook County, Illinois; that at that time the said Register, under the name and caption of the foregoing case, contained two entries, the first of which indicated to your affiant that a precipe had been filed in said suit by Attorney W. A. Morrow at 10:35 a. m. on October 15, A.D. 1929, and the second

index of court when entered of record was binding on the court and became the law of procedure in matters to which they relate when not inconsistent with the statute. Walsh v. Walsh, 230 Ill. 432. The question therefore ^{is} whether there was a misapplication of the clerk in making a minute on the register of the filing of the decision. A photostatic copy of the register, so far as it is pertinent here and as well as we are able to reproduce it in this opinion, is as follows:

Three Dollars & C	10	25	W. A. Morrow	Oct	10	25
...	1

... sworn that he graduated in 1928 from the University of Illinois, receiving the degree of Bachelor of Arts; that he had studied law in a Chicago law school for one and one-half years; that he was employed by the law firm of Cassin, Potter & Bentley which was retained by defendant to represent him in the instant case; that his duties as such employee included the keeping of an office book; that he keeps all cases; that a few days after October 17th the summons which had been served on defendant was brought by defendant to the office and turned over to him, and that it was his duty to examine the court records and report to a member of the law firm; that when the summons was delivered to him he made an entry in the diary that the decision in the case was due to be filed on Friday, October 25th, and that between that day and the following Monday he personally inspected the register of law and Chancery cases kept by the clerk of the Superior Court of Cook County, Illinois; that at that time the said register, under the name and caption of the foregoing case, contained two entries, the first of which indicated as your affiant said a prescript had been filed in said suit by Attorney W. A. Morrow at 10:35 a. m. on October 1, A.D. 1931, and the second

of which indicated to your affiant that the summons had been filed in said suit in the office of said Clerk on October 22, A. D. 1929; that the above entries were the only entries appearing on the register under the case in question, and "that your affiant personally inspected the same and that nothing in such inspection caused your affiant to believe or suspect, or give your affiant knowledge, that a declaration had been filed in said suit ***"; that "said entries were so abbreviated as to be unintelligible to this affiant and failed to convey by means of the English language such information." The affidavit further set up that the affiant made another examination of the register between Friday, November 22, and Wednesday, November 27th, and that no other entries appeared on the register except the two above mentioned.

Rule 4 of the court requires that copies of all pleadings must be filed with the clerk at the time the originals are filed and that unless such copies are furnished at the time, the clerk will refuse to file the originals.

We think the minute made by the clerk was sufficient to advise anyone at all familiar with the keeping of records that a declaration had been filed (McCord v. Briggs & Turvias, 338 Ill. 155), and that the minute made by the clerk of the court was a sufficient compliance with Rule 3 of the Superior court. That rule provides that the clerk shall make a note of the date and time of day of filing each paper, describing the same "as briefly as may be necessary for identification." In the affidavit filed by Marshall he swears he examined the register. It appears that he understood the meaning of the notation "Prae" to be that a praecipe had been filed on October 15th, but there is nothing in the record to indicate what he understood by the minute immediately following, namely, "Declar & C." We are also of the opinion that the minute made by the clerk on the register was not insufficient by reason

of which indicated to your affiant that the summons had been filed in said suit in the office of said clerk on October 22, A. D. 1933; that the above entries were the only entries appearing on the register under the case in question, and that your affiant personally inspected the same and that nothing in such inspection caused your affiant to believe or suspect, or give your affiant knowledge, that a declaration had been filed in said suit; that "said entries were so abbreviated as to be unintelligible to this affiant and failed to convey by means of the English language such information." The affiant further set up that the affiant made another examination of the register between Friday, November 22, and Wednesday, November 27th, and that no other entries appeared on the register except the two above mentioned.

Rule 4 of the court provides that copies of all pleadings must be filed with the clerk at the time the originals are filed and that unless such copies are furnished at the time, the clerk will refuse to file the originals. We think the minute made by the clerk was sufficient to advise anyone at all familiar with the keeping of records that a declaration had been filed (Wright v. Wright & Turley, 338 Ill. 123), and that the minute made by the clerk of the court was a sufficient compliance with Rule 4 of the Superior court. That rule provides that the clerk shall make a note of the date and time of day of filing each paper, describing the same "as briefly as may be necessary for identification." In the affidavit filed by your affiant he swore he examined the register. It appears that he understood the meaning of the notation "Filed" to be that a pleading had been filed on October 19th, but there is nothing in the record to indicate what he understood by the minute immediately following, namely, "Decla. & C." We are also of the opinion that the minute made by the clerk on the register was not insufficient by reason

of the constitutional provision above referred to. In the McCord case the court, in speaking of a minute made by a clerk of a court, said (p. 166): "It is evident that at some time the clerk's entry on the minute blotter, 'Mo. Df. Appl. Dis. P C & J T P,' (meaning that on motion of defendant the appeal is dismissed at plaintiff's costs and judgment entered for want of prosecution) had been changed by writing over 'Df' the letters 'Plf,' and over the first letter 'P' the letter 'D', so that it appeared to indicate that on motion of plaintiff the appeal is dismissed at defendant's costs and judgment entered for want of prosecution. The entry on the trial call-sheet, 'Mo. Dft. Appl. Dis.' was not at any time changed. The purport of all these entries is that the appeal was dismissed, which, as we have seen, agreed with the order entered. The misprision of the clerk, if there was such, was in not properly designating on whose motion the appeal was dismissed and at whose costs. These are not misprisions affecting the purport of the order dismissing the appeal rather than the cause. The petition and affidavits seek to contradict the record of the order of dismissal and likewise of the minutes. This the petitioner is not privileged to do under section 89 of the Practice act, and plaintiff in error does not bring itself within the provisions of that section."

In the instant case the minute made by the clerk is certainly as plain and intelligible as the minute made by the clerk in the McCord case. The minute is plain; it means that at 10:35 o'clock the morning of October 15, 1929, there was filed with the clerk of the Superior court in the case involved a praecipe, declaration and copy.

Something is also said by counsel for defendant to the effect that the writing of the clerk was illegible. While the writing is not as plain as it might have been, we think it was sufficient. We regret that in cases of this character judgment

of the constitutional provision above referred to. In the record case the court, in speaking of a minute made by a clerk of a court, said (p. 166): "It is evident that at some time the clerk's entry on the minute lister, 'No. 12, April, 1893,' (meaning that on motion of defendant the appeal is dismissed at plaintiff's costs and judgment entered for want of prosecution) had been changed by writing over 'No. 12, the lister '12,' and over the first letter 'P' the letter 'D', so that it appeared to indicate that on motion of plaintiff the appeal is dismissed at defendant's costs and judgment entered for want of prosecution. The entry on the trial call-sheet, 'No. 12, April, 1893,' was not at any time changed. The part of all these entries is that the appeal was dismissed, which, as we have seen, agreed with the order entered. The stipulation of the clerk, if there was such, was in not properly designating on whose motion the appeal was dismissed and at whose costs. These are not stipulations affecting the substance of the order dismissing the appeal rather than the cause. The petition and affidavit seek to contradict the record of the order of the court and likewise of the minutes. This the petitioner is not privileged to do under section 33 of the Practice act, and plaintiff in error does not bring itself within the provisions of said section."

In the instant case the minute made by the clerk is certainly as plain and intelligible as the minute made by the clerk in the record case. The minute is plain; it shows that at 10:35 o'clock the morning of October 12, 1893, leave was filed with the clerk of the superior court in the case involving a writ of habeas corpus and copy.

Something is also said by counsel for defendant to the effect that the writing of the clerk was illegible. While the writing is not as plain as it might have been, we think it was sufficient. We regret that in cases of this character judgment

should be entered by default for the maximum amount authorized by law, or for any amount, in any case, without a hearing, where there is a showing made, as here, of a meritorious defense; but we feel we are bound to follow the law and rules of court as we find them. If an injustice is caused in some cases, the rule should be changed.

In the instant case, we think the finding of the learned trial Judge to the effect that the defendant was not guilty of negligence in failing to learn that a declaration had been filed is manifestly against the weight of the evidence; therefore the order of the Superior court of Cook county is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

should be entered by default for the maximum amount authorized by law, or for any amount, in any case, without a hearing, where there is a showing made, as here, of a meritorious defense; but we feel we are bound to follow the law and rules of court as we find them. If an injustice is caused in some cases, the rule should be changed.

In the instant case, we think the finding of the learned trial judge to the effect that the defendant was not guilty of negligence in failing to learn that a deviation had been filed is manifestly against the weight of the evidence; therefore the order of the Superior Court of Cook County is reversed and the matter remanded for further proceedings in accordance with the above herein expressed.

REVEREND AND HONORABLE.

WALTER H. P. J., and ROBERT J. J., concur.

34600

HALL'S, INC., JOYCE C. HALL
and ROLLIE E. HALL,
Appellees.

vs.

SAMUEL KATZ,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2001A.3204

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$12,383.30 entered upon a verdict of a jury in an action for rent. Plaintiffs, who were lessors in a written lease, took judgment by confession in the amount of \$6,183.32 for the months of March and April, 1930, plus attorneys' fees. Defendant, the lessee, filed a motion to set aside the judgment and was given leave to defend. Upon trial the declaration was amended by stipulation to include rent for May, June and July. Defendant claimed \$3,000 as allowance for certain repairs. Plaintiffs admitted this and in the verdict defendant was given credit for this amount.

Defendant asserted his right to recoup his damages caused by plaintiffs' breach of a covenant of the lease which permitted defendant to sublease all or part of the premises, "with the written consent of the Lessors, which shall not be unreasonably withheld." Defendant asserted that he entered into an agreement to sublease one-half of the demised premises, but by reason of the unreasonable withholding of the lessors' consent this subleasing was not consummated, causing substantial loss to him. The crucial question is whether the plaintiffs unreasonably withheld their consent to the subletting.

As there must be another trial, we shall only briefly

WILLIAM S. HALL, JR.,
and ROLLIN E. HALL,
Appellants,

vs.

WILLIAM S. HALL,
Appellant.

Appeal from Superior Court
of Cook County.

MR. JUSTICE KENNEDY delivered the opinion of the court.

This is an appeal by defendant from a judgment for \$12,333.33 entered upon a verdict of a jury in an action for rent. Plaintiff, who was lessor in a written lease, took judgment by confession in the amount of \$6,166.66 for the months of March and April, 1930, and attorney's fees. Defendant, the lessee, filed a motion to set aside the judgment and was given leave to defend. Upon trial the declaration was amended by stipulation to include rent for May, June and July. Defendant claimed \$3,000 as allowance for certain repairs. Plaintiff admitted this and in the verdict defendant was given credit for this amount.

Defendant asserted his right to recover his damages caused by plaintiff's breach of a covenant of the lease which permitted defendant to sublease all or part of the premises, with the written consent of the lessor, which shall not be unreasonably withheld. Defendant asserted that he entered into an agreement to sublease one-half of the leased premises, but by reason of the unreasonable withholding of the lessor's consent this subleasing was not consummated, causing substantial loss to him. The crucial question is whether the plaintiff's unreasonable withholding of consent is the proximate cause of the loss. As there must be another trial, we shall only briefly

outline the facts. Defendant consummated a sublease of half of the premises to M. B. Hofeld for a term commencing March 1, 1930, and terminating December 31, 1939, at a certain specified rental and an additional sum equal to two per cent of the gross sales made by the subtenant in the premises demised to him. The sublease was executed in duplicate, and they were to be delivered immediately upon defendant securing plaintiffs' consent. There was evidence tending to show that one of the plaintiffs had previously told defendant that consent would be granted and directed a Miss Sinai, apparently the secretary in the office of Mr. Murphy, plaintiffs' attorney, to sign the consent.

On February 3rd Mr. Rosengard, an attorney representing defendant, called on Murphy to ask his approval of the form of consent that had been drafted. This consent was on a separate paper and was not attached to or connected physically with any of the leases. Murphy made a number of objections, but we are of the opinion that there was no reasonable merit in any of them. He insisted that the consent should contain a provision that the subtenancy should be subject to the terms and conditions of the lease from plaintiffs to defendant. Rosengard argued that this was unnecessary as Hofeld could get no greater rights than defendant had. Murphy would not agree with this, so a new form of consent was drawn up which contained an express provision that the sublease should be subject to all the terms, covenants and conditions of the lease between plaintiffs and defendant and that, in the event of any conflict between the sublease and the lease between plaintiffs and defendant, the covenants, conditions and provisions of the top lease should prevail. When this new form of consent was taken over to Murphy's office and Miss Sinai was asked to sign it pursuant to instructions which, Rosengard understood, she had received, she declined to do so, saying that Murphy was in

outline the facts. Defendant contacted a address of Hall of the premises to H. H. Hottel for a term commencing March 1, 1936, and terminating December 31, 1939, at a certain specified rental and an additional sum equal to two per cent of the Gross sales made by the defendant in the premises he had to him. The sub-lease was executed in duplicate, and they were to be delivered immediately upon defendant receiving Plaintiff's consent. There was evidence tending to show that one of the Plaintiff had previously told defendant that consent would be granted and directed a Miss Ginal, apparently the secretary in the office of Mr. Murphy, Plaintiff's attorney, to sign the consent.

On February 2nd Mr. Hottel, an attorney present- ing the defendant, called on Murphy to ask him by way of the form of consent that had been drafted. This consent was on a separate paper and was not attached to or connected physically with any of the leases. Murphy made a number of objections, but was not of the opinion that there was no reasonable doubt as to any of them. He insisted that the consent should contain a provision that the defendant should be subject to the terms and conditions of the lease from Plaintiff to defendant. Defendant argued that this was unnecessary as Hottel could get no greater rights than defendant had. Murphy would not agree with this, as a new form of consent was drawn up which contained an express provision that the sub-lease should be subject to all the terms, conditions and conditions of the lease between Plaintiff and defendant and that, in the event of any conflict between the sublease and the lease between Plaintiff and defendant, the consent, conditions and provisions of the sublease should prevail. When this new form of consent was taken over to Murphy's office and Miss Ginal was asked to sign it pursuant to instructions which Hottel understood, she had received, she declined to do so, saying that Murphy was in

Washington and would not return until the 10th of the month.

Rosengard made repeated efforts to get in touch with Murphy to obtain his signature to the consent. On the 11th Rosengard told Murphy of the urgency to secure the consent on that date, but that in any event the consent must be procured by the 17th or the Hofeld deal would be off. Murphy said he was too busy to discuss the matter that day and asked Rosengard to return the following day. On the 12th Murphy suggested to Rosengard that he had not yet seen the proposed sublease. Rosengard submitted a copy which Murphy read and objected to. There was much argument, Rosengard insisting that so long as the sublease was subject to the conditions and provisions of the top lease plaintiffs should not be concerned as to the terms of the sublease. Murphy was again informed that the consent must be secured by the 17th of the month or the defendant would lose Hofeld as a tenant. Other similar matters which it is unnecessary to detail were discussed, Rosengard saying substantially that reasonable suggestions would be acceded to but that the consent must be given by the 17th, which was the dead line; that Hofeld was carrying a large payroll and operating at a loss, and that seven or eight days had already been lost.

Without detailing the various interviews and conversations, we are of the opinion that the greater weight of testimony shows that Murphy was not making objections in good faith and was simply seeking to delay the matter. The motive for doing this is provided by the evidence showing that plaintiffs themselves were negotiating with Hofeld seeking to lease him a vacant store they had in the same building. Finally, on February 18th, the consent was signed. The defendant then took the matter up with Hofeld but received a letter from Hofeld's attorney stating that the lease was executed on February 1st, not to be delivered until February 3rd, together with the consent of the lessors; that this was not

Washington and would not return until the 10th of the month.

Rosenberg made repeated attempts to get in touch with Murphy to obtain his signature to the consent. On the 11th Rosen-
 berg told Murphy of the urgency to secure the consent on that date,
 but that in any event the consent must be procured by the 17th or
 the Hotel deal would be off. Murphy said he was too busy to dis-
 cuss the matter that day and asked Rosenberg to return the follow-
 ing day. On the 18th Murphy suggested to Rosenberg that he had
 not yet seen the proposed subpoena. Rosenberg submitted a copy
 which Murphy read and objected to. There was much argument, Rosen-
 berg insisting that so long as the subpoena was subject to the
 conditions and provisions of the top issues Plaintiff's should not
 be concerned as to the terms of the subpoena. Murphy was again in-
 formed that the consent must be secured by the 17th of the month or
 the defendant would lose Hotel as a tenant. Other similar matters
 which it is unnecessary to detail were discussed, Rosenberg saying
 substantially that reasonable suggestions would be acceded to but
 that the consent must be given by the 17th, which was the dead
 line; that Hotel was carrying a large payroll and operating at a
 loss, and that seven or eight days had already been lost.

Without detailing the various interviews and conver-
 sations, we are of the opinion that the greater weight of testimony
 shows that Murphy was not making objections in good faith and was
 simply seeking to delay the matter. The motive for doing this is
 provided by the evidence showing that Plaintiff's themselves were
 negotiating with Hotel seeking to lease him a vacant store before they
 had in the same building. Finally, on February 18th, the consent
 was signed. The defendant then took the matter up with Hotel
 but received a letter from Hotel's attorney stating that the lease
 was executed on February 1st, not to be delivered until February
 1st, together with the consent of the lessor; that this was not

procured by that date; that on February 7th Hofeld had sent a letter extending the time for the consent to and including February 17th but with notice that in the event the consent was not obtained on or before that date, the entire matter was to be regarded as ended. The letter further said that as the consent had not been obtained at the time indicated Hofeld was no longer interested in leasing the premises.

Plaintiffs cite some English cases where the words that consent should not be unreasonably withheld were construed not to impose any obligation upon the lessor to perform the covenant, but that such words were merely a qualification of the obligation of the lessee not to assign without consent and that in such a case, where the lessor unreasonably withholds consent, the lessee is left to deal with the premises without restriction and the only right he has is to place his subtenant in possession without any foundation for a claim of damages. Hyde v. Warren, 3 Exchequer Division 72; Trehear v. Bigge, 9 Exchequer 151. This is rather a refinement in analysis for, as a practical proposition, no subtenant, knowing that the consent of the top lessor must be procured, would enter into possession without consent and run the risk of having to defend a suit in ejectment.

In Underwood Typewriter Co. v. Century Realty Co., 165 Mo. App. 131, under similar circumstances it was held that, where the lessee's efforts to sublet were defeated by the unreasonable withholding of consent by the lessor, the plaintiff could recover what he had lost thereby in an action for damages. In Edelman v. F. W. Woolworth Co., 252 Ill. App. 142, this court held that this provision is inserted to prevent a tenant's right to sublet as it may please; that this provision is to be construed most strongly against the landlord and it was held that the consent had been

procured by that date; that on February 7th Hotel had sent a letter extending the time for the consent to and including February 15th but with notice that in the event the consent was not obtained on or before that date, the entire matter was to be regarded as ended. The letter further said that as the consent had not been obtained at the time indicated Hotel was no longer interested in leasing the premises.

Plaintiff's case seems English cases where the words that consent should not be unreasonably withheld were construed not to impose any obligation upon the lessee to perform the covenant, but that such words were merely a qualification of the obligation of the lessee not to assign without consent and that in such a case, where the lessor unreasonably withheld consent, the lessee is left to deal with the premises without restriction and the only right he has is to place his statement in possession without any foundation for a claim of damages. Hyde v. Warren, 3 Knebworth Division 25; Treloar v. Hyatt, 3 Knebworth 121.

This is rather a refinement in analysis for, as a practical proposition, no argument, knowing that the consent of the top lessor must be procured, would enter into possession without consent and run the risk of having to defend a suit in ejectment. In Unlabeled Township Co. v. Century Hotel Co., 185 Me. App. 131, under similar circumstances it was held that where the lessee's efforts to obtain consent were defeated by the unreasonableness of withholding of consent by the lessor, the plaintiff could recover what he had lost thereby in an action for damages. In Hyatt v. Treloar, 3 Knebworth 121, 122, this court held that this provision is inserted to prevent a tenant's right to assign as it may please; that this provision is to be construed most strongly against the landlord and it was held that the consent had been

unreasonably withheld by the lessor, and the judgment in the lessee's favor was affirmed.

In the instant case plaintiffs' representative was repeatedly notified of the necessity that the consent should be signed by February 17th or the result would be loss to defendant. Under such circumstances plaintiffs should not be heard to assert that defendant cannot claim damages. In Bates v. Donaldson (L.R. 1896) 2 Q. B. 241, it was held that under a similar condition the lessor was bound not to unreasonably withhold his permission. To the same effect are Houlder Brothers & Co. v. Gibbs (L.R. 1925) 1 Chancery 198; Ideal Film Renting Co. v. Nielson, (1921) 1 Chancery 198 and 575.

Defendant requested the court to give the following instruction, which was refused.

"The court instructs the jury that no provision of the lease between the defendant, Katz, and his subtenant, Hofeld, could have been binding upon the plaintiffs in this case, and that no tenant can by a sublease grant to a subtenant an estate or rights therein greater than the tenant himself has under his own lease."

Plaintiffs assert that this is not the law but that the rule is embodied in an instruction tendered by them, namely:

"A landlord who consents to the making of a sublease by his tenant is bound as to the subtenant by the terms and provisions of such sublease."

This also was refused. The result was that the jury received no instruction as to this vital point. We hold that the defendant's instruction was proper and should have been given.

The general rule is that a sublessee is not in privity of contract with the head landlord and is not in privity of estate with him, since there was no relation of tenancy between them, and he merely holds possession for the lessee. Tiffany on Real Property, vol. I, page 173. In Wilson-Broadway Building Corp. v. Northwestern Elevated R. R. Co., 225 Ill. App. 306, this

[illegible]

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION:

1800) 2 U. S. 281. It was held that under a similar condition the
 interest was deemed not to unconstitutionally withhold its payment. To
 that defendant cannot claim damages. In Salter v. Chalmers (1870),
 Under such circumstances plaintiff should not be held to accept
 aligned by February 17th or the result would be loss to defendant.
 reportedly notified of the necessity that the document should be

100 and 101.

Between 1960 and 1962, the number of people in the United States who were employed in the defense industry increased by 100,000.

... ..

"The court instructed the jury that no distinction of race
between the defendant, Lee, and his opponent, Holm, could
have been drawn when the difficulty in this case, and that
no intent can by a white man grant to a defendant an estate or
in this estate, except from the fact that he had been his
own master."

Hand out and out for the first time these officials

The wire is embedded in an insulating material as follows:

the 1950s and 1960s, the 1970s and 1980s, and the 1990s and 2000s. The 1950s and 1960s were the years of the "Great Migration" when millions of African Americans moved from the South to the North and West. The 1970s and 1980s were the years of the "Black Power Movement" when African Americans fought for civil rights and self-determination. The 1990s and 2000s were the years of the "New Black Movement" when African Americans focused on issues of social justice and economic equality.

This also was noted. The results were that the first group was
instructed as to this point. We will have the following
instruction was given and should have been given.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

them, and he merely holds conversation for the moment. Little or of taste with him, since there was no relation of friendship between privacy of contact with the head landlord and is not in privacy

Gold v. Northwestern University, 4 N.W.2d 258 (Iowa, 1947), 100 A.L.R. 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 16

was approved with citation of numerous decided cases.

There is much said in the evidence and there is much discussion in the briefs as to the effect of Paragraph 34 of the sublease, which provides that in the event the lessor (the defendant) should vacate a portion of the premises or make an assignment for the benefit of creditors or be adjudged a bankrupt, the lessee may take possession of the portion of the space occupied by the lessor and use the same without paying additional rental. This was one of the features in the sublease which Murphy claimed was objectionable. Rosengard argued with Murphy, as above indicated, that this could not possibly affect the rights under the top lease but finally agreed, although he stated he was under no obligation to do so, that he would change it in accordance with Murphy's wishes. Not only in the consent but also in the sublease there is a provision subjecting it to all the terms of the lease between the plaintiffs and the defendant as fully as though that lease were made a part of the sublease. Even in the absence of such provision this is the law. The plaintiffs were fully protected, for their lease provides that the lease may be terminated at once in the event of default of any of its covenants or in the event of bankruptcy or insolvency of the lessee or any assignment for the benefit of the lessee's creditors. It should be kept in mind that the consent was a contract between plaintiffs and defendant on a separate paper not attached to the sublease. Plaintiffs were not asked to approve the sublease, but merely to consent to a subletting to Hofeld, who, it is admitted, was a desirable tenant.

Defendant argues that it was error to refuse its offered instruction to the effect that if the jury believed from the evidence that Murphy's firm were attorneys for the plaintiffs in this case and representing them, "then you are instructed that the testimony of the witness, John K. Murphy, is entitled to little

was approved with citation of numerous decided cases.

There is much said in the evidence and there is much

discussion in the briefs as to the effect of Paragraph 34 of the lease, which provides that in the event the lessor (the defendant) should vacate a portion of the premises or make an assignment for the benefit of creditors or be adjudged a bankrupt, the lessee

may take possession of the portion of the space occupied by the lessor and use the same without paying additional rental. This was one of the features in the evidence which Murphy claimed was objectionable. Rosenberg argued with Murphy, as above indicated, that this could not possibly affect the rights under the lease but finally agreed, although he stated he was under no obligation

to do so, that he would change it in accordance with Murphy's wishes. Not only in the consent but also in the evidence there is a provision suggesting it to all the terms of the lease between the plaintiff and the defendant as fully as though that lease were made a part of the evidence. Even in the absence of such provision this is the law. The plaintiff's were fully protected, for their lease provides that the lease may be terminated at once in the event of default of any of its covenants or in the event of bankruptcy or insolvency of the lessor or any assignment for the benefit of the lessor's creditors. It should be kept in mind that the consent was a contract between plaintiff and defendant on a separate paper not attached to the evidence. Plaintiff were not asked to approve the evidence, but merely to consent to a substitute so held, and it is admitted, was a desirable consent.

Defendant argues that it was error to refuse the of-

fered instruction as the effect was it the jury believed from the evidence that Murphy's firm were attorneys for the plaintiff in this case and representing them, "then you are instructed that the testimony of the witness, John R. Murphy, is entitled to little

weight." While the practice of an attorney in a case testifying as a witness has been repeatedly and strongly condemned, we are not inclined to hold that from that fact alone the jury should be told that his testimony should be given little weight. There may be circumstances where from the necessities of the case an attorney is the only party who can give material testimony. It is true that in the opinion in Wiederhold v. Wiederhold, 305 Ill. 429, language similar to the instruction here was used, yet that decision must be considered as applicable to the particular facts of that case. We cannot say in the instant case that the jury should have been instructed in the language of the offered instruction.

Murphy was then asked: "You know, don't you, that the lessee of a piece of real estate cannot make a sublease and put anything in it derogatory to the rights of his own lessor?" The court sustained an objection to this on the ground that it was merely a question of law. This ruling was improper. The question was not for the purpose of raising one of law, but to test the good faith of Murphy's objections to advising his clients to give their consent to the subletting. Defendant had the right to develop the fact, if it was a fact, that Murphy's objections were based upon his statements as to the law which he knew were without merit. The question should have been permitted.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

weight." While the practice of an attorney in a case involving
as a witness has been repeatedly and strongly condemned, we are
not inclined to hold that there must have been the jury should be
told that his testimony should be given little weight. There may
be circumstances where from the necessities of the case an attorney
is the only party who can give material testimony. It is true that
in the opinion in Wheeler v. Wheeler, 305 Ill. 450, language
similar to the instruction here was used, yet that decision must
be considered as applicable to the particular facts of that case.
We cannot say in the instant case that the jury should have been
instructed in the language of the offered instruction.
Murphy was then asked: "Now then, don't you, that the
issue of a piece of real estate cannot make a difference and that
anything in it derogatory to the rights of his own interest? The
court sustained an objection to this on the ground that it was
merely a question of law. This ruling was improper. The question
was not for the purpose of raising one of law, but so that the fact
fact of Murphy's objection to sustaining his rights to give their
consent to the substitution. Defendant had the right to develop the
fact, if it was a fact, that Murphy's objection was based upon
his statements as to the fact which he knew without error.
The question (which) have been permitted.
For the reasons indicated, the court is reversed
and the same remanded.
REVEREND AND HONORABLE
Bachett, J., and O'Connor, J., concur.

34609

LAWRENCE E. JOHNSON,
Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 621

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

In the trial of a suit wherein plaintiff sought to recover damages for personal injuries he had an adverse verdict and from the judgment that he take nothing he appeals.

Plaintiff was employed as a checker on a freight boat of the Merchants Lighterage Company. Merchandise was brought by freight cars into the Randolph street yards of the defendant, there to be transferred to the Lighterage company to be carried to destination. A dock had been constructed by defendant along the south bank of the Chicago river, on which was a shed with siding for protection against the weather. Running south from this dock was a long covered platform with siding constructed alongside a depressed railroad stub track called "Track 7," bringing the platform level with the freight car floors. Part of plaintiff's duties as checker was to inspect seals on both sides of the cars to see that they had not been broken. After examining the seals on the east side of the cars, plaintiff customarily would walk northward on a ledge about sixteen inches in width, between the west siding of the covered platform and the west edge, then go diagonally across the corner of the depression on two planks which had been laid across the northeasterly corner of this depression from the westerly edge of the platform to the southerly edge of the dock. These planks were not fastened to the structure at either end and for two or three years prior to the accident had been in this position.

On March 5, 1926, as plaintiff was walking on these

LAWRENCE E. JOHNSON,
Appellant.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

200 LA. 621

MR. JUSTICE KENNEDY delivered the opinion of the court.

In the trial of a suit wherein plaintiff sought to recover damages for personal injuries he had sustained and from the judgment that he had obtained he appeals.

Plaintiff was employed as a checker on a freight boat of the Merchants Lighterage Company. Merchandise was brought by freight cars into the Randolph street yards of the defendant, there to be transferred to the lighterage company to be carried to destination. A dock had been constructed by defendant along the south bank of the Chicago river, on which was a shed with siding for protection against the weather. Running south from this dock was a long covered platform with siding connected therewith at a depressed railroad level track called "Track V." During the afternoon of the day with the freight car involved. Part of plaintiff's duties as checker was to inspect trains on both sides of the cars to see that they had not been broken. After examining the seals on the east side of the cars, plaintiff customarily would walk northward on a ledge about sixteen inches in width, between the west siding of the covered platform and the west edge, then he diagonally crossed the corner of the platform on two planks which had been laid across the north-easterly corner of this depression from the westerly edge of the platform to the southerly edge of the dock. These planks were not fastened to the structure at either end and for two or three years prior to the accident had been in this position.

On March 2, 1925, as plaintiff was walking on these

planks returning to the east side of the cars, one of them rolled and he fell in such a manner that the edge of the plank turned upward, catching him in the crotch and inflicting injuries. A witness testified that after the accident he noticed that one of the planks was warped.

The declaration alleged the duty of the defendant to keep its platform and dock in good repair and that it negligently permitted the planks of the platform and dock to remain unfastened. The case went to trial upon the declaration and defendant's plea of general issue.

Plaintiff first argues that it was reversible error for the trial court to sustain objections to certain photographs offered on his behalf. The photographs were taken about three years and four months after the accident, by plaintiff, presumably an amateur photographer. He testified that they were a correct picture of the premises at the time they were taken, but there was a difference in the pictures from the appearance of the premises on the day of the accident. He testified: "The condition is now that those planks have been cut and fitted in." The attorney for plaintiff stated that he was not offering them for the purpose of showing repairs, but just to show that they were a correct reproduction at the time they were taken. The witness was asked whether there were any other changes in the photographs except the altered condition of the planks, and replied, "There are some other changes." Objections to their introduction were sustained, the court, however, saying: "If there is a material change it would not be admissible; if there is a minor change I will permit him to state it now." And again the court said: "Whatever the difference is will have to be developed." Plaintiff was not interrogated further as to the differences.

It has been repeatedly held that photographs of

planks remaining to the east side of the car, one of them rolled and he fell in such a manner that the edge of the plank struck upward, catching him in the chest and inflicting injuries. A witness testified that after the accident he noticed that one of the planks was warped.

The defendant alleged the duty of the defendant to keep the platform and dock in good repair and that it negligently permitted the planks of the platform and dock to remain unattended. The case went to trial upon the defendant's plea of general issue.

Plaintiff first argues that it was reversible error for the trial court to exclude evidence to certain photographs offered on his behalf. The photographs were taken about three years and four months after the accident, by plaintiff, presumably an amateur photographer. He testified that they were a correct picture of the premises at the time they were taken, but there was a difference in the picture from the appearance of the premises on the day of the accident. He testified: "The condition is now that those planks have been set and fixed in." The attorney for plaintiff still stated that he was not offering them for the purpose of showing the records, but that to show that they were a correct reproduction at the time they were taken. The witness was asked whether there were any other changes in the photographs except the altered condition of the planks, and replied, "There are some other changes." Objections to their introduction were sustained. The court, however, saying: "If there is a material change it would not be admissible; if there is a minor change I will permit him to show it now." And again the court said: "However the difference in the have to be developed." Plaintiff was not introduced further as to the difference.

It has been repeatedly held that photographs of

premises taken subsequent to the date of the accident are not admissible unless they show the actual situation, circumstances and surroundings at the time of the accident. To be of any value as evidence, photographs must be shown to have been taken at a time when the situation and surroundings are unchanged. C.C.C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474; C. & E. I. R.R. Co. v. Cross, 214 Ill. 602; Iroquois Furnace Co. v. McGee, 191 Ill. 340; C. & A. R. R. Co. v. Corson, 198 Ill. 98; Hanke v. Deere & Mansur Co., 175 Ill. App. 240; Lips v. Chicago City Ry. Co., 209 Ill. App. 332; Grimm v. E. St. L. & E. Ry. Co., 180 Ill. App. 92; Althoff v. I.C. R. R. Co., 227 Ill. App. 417. We are inclined to the view that the trial courts should be liberal in admitting photographs, for it is a matter of common experience that a photograph will give one a better understanding of the surroundings than can be conveyed by mere oral description. It is to be noted, however, that in the instant case the court based its ruling excluding the photographs upon the assumption that they showed materially different surroundings than existed at the time of the accident, and offered, if they were merely minor changes, to permit the witness to state what they were. This offer was not availed of. Under such circumstances we hold that the ruling was proper.

It should be mentioned that the defendant, in turn, offered photographs which are in the record marked for identification and which show almost exactly the situation as it existed at the time of the accident, but plaintiff objected to the introduction of these and was sustained.

The burden of plaintiff's argument is that the photographs and evidence of repairs and changes were admissible to show ownership, possession and control of the planks in question and not for the purpose of proving antecedent negligence. The general rule is that negligence must be determined from what occurred before

or at the time of the accident and the evidence of repairs made after the accident is not admissible as an implied admission of negligence on the part of defendant. Kath v. E. St. L. & S. Ry. Co., 232 Ill. 126; Hove v. Medaris, 183 Ill. 288. But it has been held that under certain circumstances evidence of repairs or changes or precautions taken by the person charged with responsibility is admissible to show ownership or control. 45 C.J. 1235, and cases there cited. Plaintiff's counsel argues earnestly, especially in his reply brief, that it was reversible error to exclude such evidence as tending to show possession and control of the planks in question.

Two witnesses testified for defendant that the dock and platform were erected in 1923. Neither witness had seen any planks lying diagonally across Track 7. However, another witness for defendant testified that the planks had been lying in this position for some considerable time before the accident. Plaintiff testified that he noticed the planks the first time he had occasion to examine the ^{car} ~~the~~/seals, which would be in 1923 or 1924, and walked on them. He also testified that subsequent to the accident there was a change made in the planks and the platform. In identifying defendant's photographs he again referred to the alteration of the platform since the accident, evidently referring to his previous statement that the planks had been "cut and fitted in" the platform. At no time upon the trial until defendant had rested was there any suggestion made by plaintiff's attorney that the photographs which he sought to introduce were offered for the sole purpose of showing ownership and control. The proper practice under such circumstances requires that the offer of such evidence should be accompanied by a statement that it was offered solely for the purpose of showing ownership, possession and control and for no other purpose, and if it should be admitted, the court

should caution the jury that it was received only for the purpose stated by counsel and there should also follow an instruction stating the restriction of the evidence to its legitimate effect.

No witness was presented or questions asked, but merely a general offer to show that defendant after the accident had cut these planks and fitted them into the platform. Such evidence would have been merely cumulative, as this fact already appeared in evidence. See also Chicago City Ry. Co. v. Carrell, 206 Ill. 318.

Plaintiff also offered to show that the platform as altered remained in that condition until shortly before the trial, when the planks that had been fitted in were removed and defendant took the photographs which it sought to introduce and then put the fitted planks back into position. Evidently, what happened was - although this is criticized strongly by plaintiff's attorney - that defendant's counsel had had this done for the purpose of producing a photograph showing the conditions existing at the time of the accident, except for the absence of the two loose planks. Upon the trial plaintiff was asked to reproduce with a pen on these photographs the location of these loose planks, which he did, thus, it seems to us, reproducing almost the exact situation at the time of the accident, but plaintiff objected to the introduction of these and they were kept out. Plaintiff's offer to show that this was done did not rebut any testimony offered by defendant, but simply tended to amplify the same. Furthermore, no plea of non-ownership, possession or control was filed; only the plea of general issue, so the evidence was unnecessary.

Instruction number 14 is criticized because it refers to the unfastened or loose planks "in" the platform, and it is argued that the use of the word "in" had a tendency to mislead the jury. This instruction follows virtually the language of the plaintiff's declaration. In each count it is charged that defendant negligently

should caution the jury that it was received only for the purpose

stated by counsel and there should also follow an instruction stating the restriction of the evidence to its legitimate effect.

No witness was presented on questions asked, but

merely a general offer to show last defendant after the accident had cut these planks and fitted them into the position. Such evidence would have been merely cumulative, as this fact already appeared in evidence. See also Chicago City ex. vs. V. Garfield.

308 Ill. 316.

Plaintiff also offered to show that the platform as

offered remained in that condition until shortly before the trial, when the planks that had been fitted in were removed and defendant took the photographs which it sought to introduce and then put the

fitted planks back into position. Evidently, what happened was -

although this is criticized strongly by plaintiff's attorney -

that defendant's counsel had had this done for the purpose of producing a photograph showing the conditions existing at the time

of the accident, except for the absence of the two loose planks.

Upon the trial plaintiff was asked to reproduce with a pen on

these photographs the location of these loose planks, which he did,

that, it seems to me, reproducing almost the exact situation at

the time of the accident, but plaintiff objected to the introduction

of these and they were kept out. Plaintiff's offer to show

that this was done did not result and was offered by defendant,

but simply tended to apply the same. Furthermore, no plea of non-

ownership, possession or control was filed; only the plea of general

issue, so the evidence was unnecessarily

introduced. Instruction number 14 is criticized because it refers

to the unadmitted or loose planks "in" the platform, and it is argued

that the use of the word "in" had a tendency to mislead the jury.

This instruction follows virtually the language of the plaintiff's

decision. In each case it is charged that defendant negligently

permitted divers planks wherewith said platform was constructed and built to be and remain unfastened, by reason whereof plaintiff while walking over said platform tripped and stumbled upon one of the unfastened planks of the platform. The language of the count clearly describes the plank of or in the platform, and the instruction merely followed the charging part of the plaintiff's declaration. There was no error in giving it.

Instruction number 15 is also criticized. It told the jury, in substance, that if it believed that the plank on which plaintiff was walking when injured was not a part of the platform or other structure provided by defendant, but was a loose plank laid over the depression over Track 7 by some person using the premises for his own convenience without the knowledge, either actual or constructive, of the defendant, then the defendant should not be liable for the injury. The testimony is undisputed that the loose planks were not a part of the structure. Track 7, where they were laid, was devoted exclusively to the use of the Merchants Lighterage Company, plaintiff's employer. So far as the evidence shows, plaintiff was the only one who used these planks. The customary way for one going from one side of the track to the other was along the platform and through the deck. There was no evidence that any officer or agent of the Railroad company had any actual knowledge of the presence of these planks over the depression. We hold that under the evidence the instruction was proper.

The giving of five instructions at the request of defendant on the subject of contributory negligence is criticized. The evidence tended to show that plaintiff was thoroughly familiar with these planks and knew they were not fastened. There was evidence that at the time of the accident there was snow on them. Plaintiff's first explanation of the accident made on the day it happened was that the plank was "full of snow." He was a very

permitted divers plankers whereas said planker was contacted and built to be and remain unfastened, by reason whereof plaintiff while walking over said planker tripped and stumbled upon one of the unfastened planks of the planker. The language of the complaint clearly describes the plank of or in the planker, and the instruction merely followed the charging part of the plaintiff's declaration. There was no error in giving it.

Instruction number 13 is also criticized. It told the jury, in substance, that it is believed that the plank on which plaintiff was walking when injured was not a part of the planker or other structure provided by defendant, but was a loose plank laid over the depression over track 7 by some person using the planker for his own convenience without the knowledge, either actual or constructive, of the defendant, then the defendant should not be liable for the injury. The testimony is undisputed that the loose planks were not a part of the structure. Track 7, where they were laid, was devoted exclusively to the use of the defendant's light-railway. Plaintiff's employer, as far as the evidence shows, plaintiff was the only one who used these planks. The ordinary way for one going from one side of the track to the other was along the planker and through the deck. There was no evidence that any other person or agent of the railroad company had any actual knowledge of the presence of these planks over the depression. We hold that under the evidence the instruction was proper.

The giving of five lesser claims at the request of defendant on the subject of contributory negligence is criticized. The evidence tended to show that plaintiff was thoroughly familiar with these planks and knew they were not fastened. There was evidence that at the time of the accident there was snow on them. Plaintiff's first explanation of the accident made on the day it happened was that the plank was "full of snow." It was a very

heavy man, weighing 260 pounds. The jury could properly believe that in attempting to walk on this plank, instead of going by way of the platform and dock, in going to the other side of the cars, plaintiff was guilty of contributory negligence.

We see no reason to disapprove of the verdict and as there were no reversible errors on the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Conner, J., concur.

heavy man, weighing 300 pounds. The jury could properly believe that in attempting to walk on this plank, instead of going by way of the platform and door, in going to the other side of the cars, plaintiff was guilty of contributory negligence.

It was no reason to disprove of the verdict and as there were no reversible errors on the trial the judgment is

affirmed.

APPROVED.

WATSON, P. J., and WATSON, J., concur.

34681

ROSIE EDWARDS,
Appellee.

vs.

COMMONWEALTH BURIAL ASSOCIATION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 621²

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$400 entered upon trial, by the court, of plaintiff's claim on a burial policy or certificate issued to Rosie B. Harper, now deceased. For a number of reasons this judgment cannot stand.

In the Certificate upon which suit was brought the beneficiary named is the "Arcade Finance Co." This beneficiary may be changed provided the written consent of the beneficiary is filed with the Association and such change is accepted by the Commonwealth Burial Association. Plaintiff testified that she was the aunt of Rosie B. Harper, the insured, but there is no evidence whatever of any change in the beneficiary from the Arcade Finance Co. to plaintiff. We do not see how, in the absence of such evidence, the plaintiff is entitled to recover on the Certificate.

The Certificate contains a provision that the member must pay weekly premiums in advance on or before each Monday during the life of the member. Defendant introduced evidence tending to show that no premiums were paid, only a joining fee of twenty-five cents, and that their records do not show that any other money was paid. Plaintiff testified that she paid the premiums to some one whom she describes as "the writer that came after it." Presumably this was a Mr. Williams who secured the application. He was no longer employed by the defendant and did not testify upon the trial. If there is another trial he should be produced

ROBIN L. HANCOCK, Defendant.

vs.

COMMONWEALTH MUTUAL ASSOCIATION, a Corporation, Appellant.

STATE OF MASSACHUSETTS

IN SENATE

2001.11.02

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$400 entered upon trial, by the court, of plaintiff's claim on a burial policy or certificate issued to Rosale H. Barker, now deceased. For a number of reasons this judgment cannot stand.

In the Certificate upon which suit was brought the beneficiary named in the "Arcade Finance Co.". This beneficiary may be changed provided the written consent of the beneficiary is filed with the association and such change is accepted by the Commonwealth Mutual Association. Plaintiff testified that she was the aunt of Rosale H. Barker, she married, but there is no evidence whatever of any change in the beneficiary from the Arcade Finance Co. to plaintiff. It is not so now, in the absence of such evidence, the plaintiff is entitled to recover on the Certificate.

The Certificate contains a provision that the member must pay weekly premiums in advance on or before each Monday containing the life of the member. Defendant introduced evidence tending to show that no premiums were paid, only a joining fee of twenty-five cents, and that their records do not show that any other money was paid. Plaintiff testified that she paid the premium to some one when she described as "the writer that came after it." Presumably this was a Mr. Williams who secured the application. He was no longer employed by the defendant and did not testify upon the trial. If there is another trial he should be produced

if possible.

The Certificate also provided that it should not be in full benefit until thirteen weeks premiums had been paid; that until thirteen weeks premiums had been paid the member shall be entitled to one-half benefits. The insured died thirteen days after the Certificate was issued, and yet judgment was entered for the full amount of the Certificate.

The Certificate also provided that the member must be in sound health and free from injury when the Certificate was delivered, and that there should be no liability arising from any accident or disease occurring prior to the time of the delivery of the Certificate. The Certificate was issued October 7, 1929. The insured was "carried" to the hospital on the 11th and she died on the 20th. The medical certificate states the cause of death as "diffuse peritonitis following salpingitis" and as a contributing cause "intra abdominal abscesses" and the duration of the illness one month. The record shows nothing else touching her condition of health at the time of the delivery of the Certificate. Provisions that the insured must be in sound health at the time of the delivery of the policy have been held to be valid as conditions precedent to the beneficiary's recovery. Laughlin v. North America Benefit Corp., 244 Ill. App. 391; Lerandowski v. Western & Southern Life Co., 241 Ill. App. 35; Hartsock v. Kaskaskia Live Stock Ins. Co., 223 Ill. App. 443.

The claim for damages was based solely upon the refusal of defendant to bury the deceased, but there is no evidence that plaintiff was put to any expense in the matter or suffered any damages. Apparently the deceased was buried by Cook county.

Complaint is made that the court admitted and considered incompetent evidence. Such errors will hardly occur

if possible.

The Certificate also provided that it should not be in full benefit until thirteen weeks premiums had been paid; that until thirteen weeks premiums had been paid the member shall be entitled to one-half benefits. The insured died thirteen days after the Certificate was issued, and yet judgment was entered for the full amount of the Certificate.

The Certificate also provided that the member must be in sound health and free from injury when the Certificate was delivered, and that there should be no liability arising from any accident or disease occurring prior to the date of the delivery of the Certificate. The Certificate was issued October 7, 1922. The insured was "carried" to the hospital on the 11th and she died on the 10th. The medical certificate states the cause of death as "diffuse peritonitis following ectopic" and as a contributing cause "inter abdominal operation" and the duration of the illness one month. The record shows nothing else touching her condition of health at the time of the delivery of the Certificate. Provisions that the insured must be in sound health at the time of the delivery of the policy have been said to be valid as conditions precedent to the beneficiary's recovery.

Hamblin v. North American Indemnity Co., 244 Ill. App. 321; Loughborough v. Western & Southern Life Co., 241 Ill. App. 32; Wynne v. Bankers Life & Trust Co., 222 Ill. App. 443.

The claim for damages was based solely upon the refusal of defendant to pay the deceased, but there is no evidence that plaintiff was out to any expense in the matter or suffered any damage. Apparently the deceased was buried in Cook county. Complaint is made that the court admitted and considered incompetent evidence. Such errors will hardly occur

upon another trial.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

upon another trial.

For the reasons above detailed the judgment is re-

versed and the case remanded.

REVERSED AND REMANDED.

WATKINS, J., and O'CONNOR, J., concur.

34708

R. BERNARD BURTON,
Appellee.

vs.

SOL RUBIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 621³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action of the fourth class in the Municipal court plaintiff upon trial by a jury had a verdict for \$150. From the judgment thereon defendant appeals.

Plaintiff's statement of claim was for services rendered defendant in making appraisals of certain buildings in Chicago to be used by defendant before the Board of Review. No affidavit of defense was filed. A case of the fourth class is what the evidence makes it.

There is no denial but that plaintiff performed the services and that his charges for same are fair. The defense seems to be a denial of any authorization by defendant for plaintiff to do this work.

Plaintiff testified as to his experience in appraising buildings; that Mr. Burman, the attorney who represented the defendant in this case, approached him and inquired whether plaintiff could appraise certain buildings for the defendant. Burman said defendant was filing a complaint before the Board of Review regarding the taxes assessed on his property for the year 1928 and wanted an appraisal. He was told where the property was located and an appointment was made to meet the defendant there. Subsequently plaintiff met the defendant at his office and was shown by defendant through the property to be appraised and plaintiff took its dimensions and considered its construction and proceeded to make an appraisal of its value. At the same time defendant told plaintiff he had another

R. ARNOLD KURSON,

Appellant,

vs.

SOL RUBIN,

Appellee.

ALL AT THE MUNICIPAL COURT

OF CHICAGO.

300 A-621

MR. JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.

In an action of the fourth class in the Municipal Court plaintiff upon trial by a jury had a verdict for \$100. From the judgment thereon defendant appeals.

Plaintiff's statement of claim was for services rendered defendant in making appraisals of certain buildings in Chicago to be used by defendant before the Board of Review. He testified that a case of the fourth class is what the evidence makes it.

There is no denial but that plaintiff performed the services and that his charges for same are just. The only issue to be a denial of any actual benefit to defendant and for plaintiff to do this work.

Plaintiff testified as to his experience in appraisals; that Mr. Burton, the attorney who represented the defendant and in this case, approached him and inquired whether or plaintiff could appraise certain buildings for the defendant. Between said defendant

was filing a complaint before the Board of Review regarding the taxes assessed on his property for the year 1929 and wanted an appraisal. He was told where the property was located and an appointment was made to meet the defendant there. Plaintiff testified that the defendant at his office and was shown by defendant through the property to be appraised and plaintiff took the appraisals and considered the valuation and proceeded to make an appraisal of its value. At the same time defendant told plaintiff he had another

building nearby and walked with plaintiff over to that building and showed plaintiff through it and asked him to appraise this one. The appraisals ^{were} made and submitted. Subsequently Burman told plaintiff that defendant had three more buildings which he wished to have appraised and told plaintiff to make these appraisals. These appraisals also were made and delivered to Burman. Later Burman called at plaintiff's office and left word that plaintiff should appear before the Board of Review and give verbal confirmation of the written appraisals made by him, stating how he arrived at his figures. Plaintiff testified that appraisals of five buildings were made; that there was no agreement as to the amount that should be paid, and testified as to the reasonableness of the charges. On cross-examination of plaintiff by Burman, plaintiff testified that there was nothing ever said to him that his payment was on a contingent basis, depending upon the amount of any reduction which the Board of Review might make. Plaintiff further testified that after he appraised the first two properties he met Burman who said that a check in payment for this work would be sent him within a few days.

The only other witness testifying was the defendant, who stated that he turned the matter over to Mr. Burman to look after his taxes; that Charles Barrett, a member of the Board of Review, first mentioned plaintiff's name to defendant and recommended that he be asked to make appraisals. Defendant says he never spoke to plaintiff about how much he was to charge defendant for making the appraisals. Defendant admitted that he talked with plaintiff regarding his appearance before the Board of Review; that he knew plaintiff was getting figures of appraisal on the property. Burman asked questions of defendant tending to show that he, defendant's attorney, was retained to represent defendant in the tax matters on a contingent basis. Objections to such questions were properly sustained. Any private arrangement that defendant had with

building nearby and walked with plaintiff over to that building and
showed plaintiff through it and asked him to appraise this one.
The appraisals ^{were} made and submitted. Subsequently Bureau told
plaintiff that defendant had three more buildings which he wished to
have appraised and told plaintiff to make these appraisals. These
appraisals also were made and delivered to Bureau. Later Bureau
called at plaintiff's office and left word that plaintiff should ap-
pear before the Board of Review and give verbal confirmation of the
written appraisals made by him. Stating how he arrived at his fig-
ures. Plaintiff testified that appraisals of five buildings were
made; that there was no agreement as to the amount that should be
paid, and testified as to the reasonableness of the charges. On
cross-examination of plaintiff by Bureau, plaintiff testified that
there was nothing ever said to him that his payment was on a contin-
gent basis, depending upon the result of any reduction which the
Board of Review might make. Plaintiff further testified that after
he appraised the first two properties he left Bureau and said that
check in payment for this work would be sent him within a few days.
The only other witness testified that was the defendant.
who stated that he turned the matter over to Mr. Bureau to look
after his taxes; that Charles Barrett, a member of the Board of
Review, first mentioned plaintiff's name to defendant and recom-
mended that he be asked to make appraisals. Defendant says he
never spoke to plaintiff about how much he was to charge defendant
for making the appraisals. Defendant admitted that he talked with
plaintiff regarding his appearance before the Board of Review; that
he knew plaintiff was getting letters of appraisal on the property.
Bureau asked questions of defendant leading to the fact that he, de-
fendant's attorney, was retained to represent defendant in the tax
matters on a contingent basis. Objections to such questions were
properly sustained. Any private arrangement that defendant had with

his attorney could not affect the obligation of defendant to plaintiff. Defendant admitted he tried to get in touch with plaintiff and left word at plaintiff's office that he had called. Defendant after having stated that he had filed a complaint with the Board of Review to reduce the values, was asked, "And that was the reason, if any, that Mr. Kurzon was retained, as an appraiser?" and answered "Yes." He further corroborated plaintiff's evidence to the effect that they had examined the first two buildings together and that defendant had walked around the buildings "with him to appraise it."

The defense in this court seems to rest upon the authority of Burman, defendant's attorney, to employ plaintiff. There was evidence that plaintiff was employed directly by defendant on two of the buildings and there was sufficient evidence to justify the conclusion of the jury that the employment of plaintiff on all the buildings was at the instance of defendant and with his knowledge and consent.

There were no reversible errors in the rulings of the court upon the evidence. Complaint is made of an instruction. The abstract does not show that any objections to the instructions were made, neither does it show that this was the only instruction given. We see no sufficient reason to reverse and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs. . . .
O'Connor, J., dissents.

his attorney could not effect the production of defendant in person.
The defendant admitted he tried to get in touch with plaintiff
and left word at plaintiff's office that he had called. Defendant
after having stated that he had been a company with the court of
review to reduce the value, was asked, "And that was the reason, is
any, that Mr. Burton was retained, as an expert?" and answered
"Yes." He further corroborated plaintiff's evidence to the effect
that they had examined the first two buildings together and that
defendant had talked around the buildings with him to convince it.
The defense in this court seems to rest upon the au-
thority of Burman, defendant's attorney, to deny plaintiff.
There was evidence that plaintiff was employed directly by defendant
on two of the buildings and there was no effort at evidence to justify
the conclusion of the jury that the employment of plaintiff on all
the buildings was at the instance of defendant and with his knowledge
and consent.
There were no reversible errors in the ruling of the
court upon the evidence. Objections made or an instruction. The
abstract does not show any objections to the instructions were
made, neither does it show that this was the only instruction given.
We see no sufficient reason to reverse and the judgment is affirmed.
AFFIRMED.

W. J. Connor, J. J. Conner, J. J. Conner, J. J. Conner.

34717

SISSA GARANSSON, JOHN SVARD, ANNA
MARIA PERSSON, PER HILDING MONSON,
IDA ULRIKA JOHANSSON, NILE EDVIN
MONSON and ERNST GUSTAV MONSON,
Appellants,

vs.

CECELIA PFANDLER and GEORGE PFANDLER,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

260 I.A. 621

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from a decree ordering their bill dismissed for want of equity, which bill sought to have set aside the last will and testament of Sam Sward, deceased, on the ground that at the time of its execution he was of unsound mind and memory and also that the defendants, the beneficiaries named in the will, exercised undue influence and fraudulent practices inducing him to make the will. Separate answers were filed by Cecelia Pfandler, as executrix under the will and individually, and by George Pfandler, a minor, by guardian ad litem. The complainants filed a replication to the answer of Cecelia Pfandler. The cause came on for trial before the court without a jury and resulted in a decree sustaining the will.

Sam Sward, the testator, was about sixty years of age at the time of his death which took place in the early morning of December 4, 1927, while he was a patient at the South Shore hospital in Chicago. Complainants are two sisters, a brother and nieces and nephews of the testator. Apparently they live in Sweden. Defendants are not related to him. The determination of the issues rests wholly on the circumstances of the execution of the will.

Dr. Proby testified that he was connected with the South Shore hospital; that Sam Sward entered the hospital in October 1927, and the witness was one of his physicians; no one else attended

ELIZABETH GARRISON, JOHN GARRISON, ANNA
KARLA PERMAN, THE LIVING MONROE,
IDA ULLMAN JONHANNSON, ELLA NYLUND
MONROE and ERST GUSTAV MONROE,
Appellants.

WRIT OF HABEAS CORPUS
COURT OF COMMONS

ONCELLA BRANDEN and GEORGE BRANDEN,
Appellees.

MR. JUSTICE MERRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondents from a decree
ordering their bill dismissed for want of equity, which bill sought
to have set aside the will and testament of said decedent, de-
ceased, on the ground that at the time of its execution he was of
unsound mind and memory and also that the respondents, the defend-
ants named in the bill, exercised undue influence and fraudulent
practices in procuring him to make the will. The respondents were
joined by Cecelia Branden, as executrix under the will and individ-
ually, and by George Branden, a sister, by guardian ad litem. The
complaints filed a petition to the master of Cecelia Branden.
The cause came on for trial before the court without a jury and re-
sulted in a decree sustaining the will.
The decedent, the plaintiff, was about sixty years of age
at the time of his death which occurred in the early morning of
December 4, 1927, while he was a patient at the South State Hospi-
tal in Chicago. Complaints were filed by the respondents and his
and nephews of the last date. Apparently they have in Sweden. The
testaments are not related to him. The determination of the respon-
dents wholly on the direct evidence of the execution of the will.
Mr. Bishop testified that he was connected with the
South State Hospital; that he was called to the hospital in October
1927, and the witness was one of his physicians; he was also attending

him except an interne, Dr. Rest, who at the time of the trial was in a sanitarium in New Mexico. Dr. Proby testified that at the time of signing the will Sam Sward was physically a sick man but his mind at the time was or seemed to be rational; that the witness was in the room when some individual (the lawyer, William Graham) asked him to witness Sward's signature to the will. The witness saw Sward sign the will with a cross. Dr. Proby signed as a witness, as did Dr. Rest and Charles R. Dahlen. That this was approximately two or three o'clock in the afternoon of December 3rd; that he saw Sward frequently during the day; that in the afternoon he would have little relapses and come out of it with cardiac stimulants; that at the time he signed the will he seemed to be rational and acted as he had done every day. From the time of signing the will up to the time he passed away about two or three o'clock the following morning, Dr. Proby said he would not say his mind was very active; he was a very sick man; his heart was not the best; he had heart dilation and towards evening seemed to get worse; he talked with the doctor about every fifteen minutes and at the time he talked as if he were rational. He was sitting up in bed at the time he signed the will. From eight o'clock in the evening he was getting worse and was practically dying. Cecelia Pfandler was in the room nearly all the last day of his life. The witness believed to the best of his knowledge that Sward was of sound and disposing mind and memory when he signed the will.

Charles R. Dahlen, who was a witness to the will, testified that he had known Sward about eight or nine months before he died; that he visited him four or five times in the hospital and had occasion to talk with him. The first conversation was early in November; that although Sward was a pretty sick man "he talked all right. Everything he understood," "his mind was

him except as interned, Dr. Root, who at the time of the trial was in a condition in New Mexico. Dr. Troby testified that at the time of signing the will Sam Ward was physically a sick man but his mind at the time was as sound as a bell; that the witness was in the room when some individuals (the lawyer, William Graham) asked him to witness Ward's signature to the will. The witness saw Ward sign the will with a cross. Dr. Troby signed as a witness, as did Dr. Root and Charles R. Dalton. That this was approximately two or three o'clock in the afternoon of December 2nd; that he saw Ward frequently during the day; that in the afternoon he would have little business and come out of it with cardiac stimulation; that at the time he signed the will he seemed to be rational and acted as he did from every day. From the time of signing the will up to the time he passed away about two or three o'clock the following morning, Dr. Troby said he would not say his mind was very active; he was a very sick man; his heart was not the best; he had constant stimulation and nervous evening seemed to get worse; he talked with the doctor about every fifteen minutes and at the time he talked as if he were rational. He was sitting up in bed at the time he signed the will. From eight o'clock in the evening he was feeling worse and was practically dying. Cecilia Kinsler was in the room nearly all the time of his life. The witness believed to the best of his knowledge that Ward was of sound and disposing mind and memory when he signed the will.

Charles R. Dalton, who was a witness to the will, testified that he had known Ward about eight or nine months before he died; that he visited him from or after that time in the hospital and had occasion to talk with him. The latest conversation was early in November; that although Ward was a greatly sick man "he talked all right. Everything he understood." His mind was

all right;" that he, Sward, talked to the witness "just like I talk to you now." The witness was at the hospital when the will was signed. "I saw him sign his signature to this will. his cross there." It was signed in the presence of Sward and in the presence of the witnesses. He (the witness) signed at the request of Sward and believed him at the time to be of sound and disposing mind and memory; that after signing the will the witness remained about an hour in the room; that the testator had never talked to the witness about his family in Sweden; that he never told the witness that he had made another will about three months before; that he did not tell the witness anything about his brothers and sisters; that when Mr. Graham, the attorney, came in with the will he showed it to Sward. "I saw Mr. Graham read it." And then Sward read it. After he read it Sward signed it. Sward "had it in front of himself, and after he glanced at it there and read it, he signed it, and I saw him sign it." Sward "had his glasses on and looked at it. So far as the outsider could judge, he was reading it. He spent, oh, a couple of minutes in reading it."

William Graham testified that he was a lawyer practicing in Chicago for twenty-five years; that he knew Sward in his lifetime; that he had known him fifteen years in Chicago and did business for him. During the fifteen years he would see him often, maybe two or three times a year, and that he might not see him for a year. The last year or two before he died the witness did not see him very often. During the fifteen years he knew and saw him Sward's mind was sound. The witness first learned that Sward was in the hospital the day on which he signed the will; that when the witness returned to his office there was a call to come to the hospital, Sward wanted to see him. He went there and Sward said, "Graham, I want to make a

all right; that is, I said, "I said to the witness 'Just like I talk to you now.' The witness was at the hospital when the will was signed. I saw him sign his signature to the will. His name there." It was signed in the presence of me, and in the presence of the witnesses. He (the witness) signed at the request of Gwert and delivered him at the time to be of record and dissolving wind and money; that after signing, the will the witness remained about an hour in the room; that the testator had never talked to the witness about his family in town; that he never told the witness that he had a son; that the witness will about three months before; that he did not tell the witness anything about his property and interests; that when in Gwert, the attorney, came in with the will he signed it to Gwert. "I saw Mr. Gwert sign it." and the witness said it. "I saw him sign it." Gwert signed it. "I saw him sign it." and after he signed it it there and said it, he signed it, and I saw him sign it." Gwert "I saw his signature on the will at it. So far as the witness could tell, he was signing it. He signed, or, a couple of minutes in signing it."

William Gwert testified that he was a lawyer practicing in Chicago for many years; that he knew and was in his lifetime; that he had known the witness for many years in Chicago and his business for him. During the last few years he had seen him often, maybe two or three times a year, and he had not seen him for a year. The last year or so before he died the witness did not see him very often. During the last year or so he had seen him and saw his Gwert's wife and son. The witness testified that Gwert was in the hospital for some time and he signed the will; that the witness returned to his office there was a call to come to the hospital, Gwert wanted to see him. He went there and Gwert said, "Gwert, I want to see a

will." Mrs. Pfandler was sitting close to the bed, and her son (the defendant George) was close by, and Sward said, "I want to give everything I have to these two people; she is the only one has ever done anything for me, and I want to give everything I have to her." He also said, "I made some kind of a will down at the South Chicago Bank, but I don't like it. I want to make another." Mr. Graham asked Sward if he wanted to give Mrs. Pfandler and her son everything and Sward replied, "Yes." Sward said Mr. Graham could draw the will at the hospital, that there were doctors there that could sign it, but Mr. Graham said he would rather do it in the regular way, that it would only take him a little while to go back to the office and draw the will and that he would come back right away and have it signed up. The witness went to his office, drew the will and in an hour returned. Mr. Graham was asked about Sward's condition of mind and memory at that time and replied, "Well, that is a hard question. He was of highly nervous state, but as far as I could see, absolutely rational, about knowing what he wanted to do, seemed very determined, and understood what he wanted done with his property." When the witness returned with the will he asked Sward whom he wanted to sign as witnesses and Sward said, "These two doctors and Dahlen." The witness put the will down in front of him, read it to him, and while reading it Sward stopped and said, "Hold on, Graham. I have some real estate over in Indiana. You didn't say anything about that." Mr. Graham told him the way the will was drawn, it gave everything, real estate and personal property, everything Sward had, wherever it was located. Sward said, "Well, if that is so it is all right. That is the way I want it." He inquired about the hospital and doctors bills and said, "She (Mrs. Pfandler) is to pay all the doctor bills and hospital bills and all my debts, and then she gets everything.

will." Mrs. Plancher was sitting close to the bed, and her son (the defendant George) was close by, and Ward said, "I want to give everything I have to these two people; she is the only one has ever done anything for me, and I want to give everything I have to her." He also said, "I made some kind of a will down at the South Chicago Park, but I don't like it. I want to make another." Mr. Graham asked Ward if he wanted to give Mrs. Plancher and her son everything and Ward replied, "Yes." Ward said Mr. Graham could draw the will at the hospital, that there were doctors there that could sign it, but Mr. Graham said he would rather do it in the regular way, that it would only take him a little while to go back to the office and draw the will and that he would come back right away and have it signed up. The witness went to his office, drew the will and in an hour returned. Mr. Graham was asked about Ward's condition at mind and memory at that time and replied, "Well, that is a hard question. He was of highly nervous state, but as far as I could see, absolutely rational, about knowing what he wanted to do, seemed very determined, and understood what he wanted done with his property." When the witness returned with the will he asked Ward when he wanted to sign as witnesses and Ward said, "These two doctors and Dabson." The witness put the will down in front of him, read it to him, and while reading it Ward nodded and said, "Hold on, Graham. I have some real estate over in Indiana. You didn't say anything about that." Mr. Graham said him the way the will was drawn, it gave everything, real estate and personal property, everything Ward had, whatever it was located. Ward said, "Well, it just is no it is all right. That is the way I want it." He inquired about the hospital and doctors bills and said, "She (Mrs. Plancher) is to pay all the doctor bills and hospital bills and all my debts, and then she gets everything."

She and the boy gets everything." Sward was then asked if he was ready to sign; he said he was and signed it and the witnesses signed it. About twelve years before Sward died the witness had talked to him about young George Pfandler, and Sward told him he thought a great deal of him and he was going to provide for him. The witness said he had drawn a will a great many years before Sward died, in which he had made some provision for Mrs. Pfandler and the boy. Mrs. Pfandler was Sward's housekeeper at the time.

Pierre DuFreane testified on behalf of complainants that he was a nurse and was in the South Shore hospital when Sward was there; that he was first called into Sward's room on December 3, 1926, in the evening about 9:30 o'clock and was there until Sward died the next morning. The witness stated that when he came in the room Sward was sitting up in bed with his trousers, vest and coat on and a blanket around him. The witness asked him how he was feeling and he said pretty bad. The witness asked him what the trouble was and he said heart disease. In response to the question as to what Sward had said that indicated the condition of his mind, the witness replied, "On account of staring at me, and the way he acted, like insane;" that Mrs. Pfandler was in the room for about an hour, when she went away, leaving instructions with the witness that if Sward should die during the night to call her by 'phone and she would come right away and take care of the body.

Josephine Krewson testified that she was a nurse at the hospital and remembered the last few days of Sward's life there. He had difficulty in breathing and said generally that he felt bad. "That was the extent of the conversation between us at any time." In the afternoons he would appear to be irrational and doze off and wake up suddenly. The last few days of his life

the and the boy gets everything. Ward was then asked if he was ready to sign; he said he was and signed it and the witnesses signed it. About twelve years before Ward died the witness had talked to him about young George Fleming, and Ward told him he thought a great deal of him and he was going to provide for him. The witness said he had drawn a will a great many years before Ward died, in which he had made some provision for him. Fleming and the boy, Mrs. Fleming was Ward's housekeeper at the time.

Pierre D'Amore testified on behalf of complainants that he was a nurse and was in the Boston Sperry Hospital when Ward was there; that he was first called into Ward's room on December 3, 1926, in the evening about 9:30 o'clock and was there until Ward died the next morning. The witness stated that when he came in the room Ward was sitting up in bed with his hands bent and coat on and a blanket around him. The witness asked him how he was feeling and he said pretty bad. The witness asked him what the trouble was and he said heart disease. In response to the question as to what Ward had said that indicated the condition of his mind, the witness replied, "On account of staying at me, and the way he acted, like I mean;" that Mrs. Fleming was in the room for about an hour, when she went away, leaving in attention with the witness that it Ward should die during the night to call her by 'phone and she would come right away and take care of the body.

Josephine Brown testified that she was a nurse at the hospital and remembered the last few days of Ward's life there. He had difficulty in breathing and said generally that he left bad. That was the extent of the conversation between us at any time. In the afternoon he would cough in his functional and dose off and wake up suddenly. The last few days of his life

his physical and mental condition was bad. He could not walk around without aid. Mrs. Pfandler would come about twice a day in the last week to see him; that the witness was not there until about six o'clock in the evening. About a week before he died Sward talked with the witness at times. He did not appear any different or act any different than ordinary patients. "Whatever conversation I had with him was intelligible and it was questions and answers such as any ordinary patient could make."

Myrtle Borg testified that she had known Sward for some six years; that she visited him in the hospital every other day; that she was there on the afternoon of December 3rd and talked to Sward, but he did not answer; that he was pulling his hair and delirious. She had no conversation with him. There were circumstances developed on cross examination which indicated that this witness was hostile to Mrs. Pfandler.

Joseph Poynton testified that he was a lawyer employed by Sward at different times for several years before his death; that in September, 1927, he drew a will for ^{him} which was deposited with a Mr. Smith of the South Shore Savings Bank; that he called at the hospital some three weeks before Sward died, but did not see him thereafter.

To have mental capacity to execute a will a testator does not have to be absolutely of sound mind and memory in every respect. Pendarvis v. Gibb, 328 Ill. 282. All that is required is that he have sufficient mental capacity to comprehend and remember who are the natural objects of his bounty, to comprehend the kind and character of his property, and to make disposition of that property according to some plan formed in his mind. He must understand the particular business in which he is engaged. The test refers to the time of making the will. Flanigan v. Smith, 337 Ill. 572, and cases there cited. The opinion of a person that the testator is of unsound mind is of very little, if any, weight

his physical and mental condition was bad. He could not walk around without aid. Mrs. Flanigan would come about twice a day in the last week to see him; that the witness was not there until about six o'clock in the evening. About a week before he died Gward talked with the witness at times. He did not appear any different or act any different than ordinary patients. "However conversation I had with him was intelligible and it was questions and answers such as any ordinary patient could make."

Myrtle Berg testified that she had known Gward for some six years; that she visited him in the hospital every other day; that she was there on the afternoon of December 3rd and talked to Gward, but he did not answer; that he was pulling his hair and delirious. She had no conversation with him. There were circumstances developed on cross examination which indicated that this witness was hostile to Mrs. Flanigan.

Joseph Repton testified that he was a lawyer employed by Gward at different times for several years before his death; that in September, 1937, he drew a will for which was deposited with a Mr. Smith of the South Shore Savings Bank; that he called at the hospital some three weeks before Gward died, but did not see him thereafter.

To have mental capacity to execute a will a testator does not have to be absolutely of sound mind and memory in every respect. Pontrevis v. Allen, 328 Ill. 522. All that is required

is that he have sufficient mental capacity to comprehend and remember who are the natural objects of his bounty, to comprehend the kind and character of his property, and to make disposition of that property according to some plan formed in his mind. He must understand the legal business in which he is engaged. The last refers to the time of making the will. Flanigan v. Smith, 337 Ill. 572, and cases there cited. The opinion of a person that the testator is of unsound mind is of very little, if any, weight

where it is not based upon circumstances stated by the witness which will induce a reasonable belief of unsoundness of mind.

Valentine v. Second Baptist Church, 293 Ill. 71. The law presumes that every man who has arrived at years of discretion is of sound mind and memory and capable of disposing of his property by will until the contrary is shown. Maier v. Maier, 338 Ill. 102. In Engeseath v. Engeseath, 338 Ill. 276, the trial court found that the testator was at the time of the execution of the will of unsound mind, but this was reversed by the Supreme court, which held that, where the testator although seriously ill had lucid intervals and the will was executed during a lucid interval, when the testator knew what he was doing, the will was executed while the testator was of sound mind.

The evidence shows conclusively that the testator was well aware of what he was doing when he directed Graham to draw the will and when he executed it. All the witnesses who saw him at this time testified to the effect that he was mentally sound and capable. We cannot reasonably conclude that he was mentally unsound when he signed the will at about two o'clock p. m., from the fact that afterwards at about eight o'clock p.m. he began to enter into his dying struggles. It is a matter of common knowledge that a person suffering from heart disease, as Sward was, may even up to a very short time before death be entirely clear mentally and fully capable of transacting business.

The decision in any case of this character rests peculiarly upon the facts in that case. The chancellor was fully justified in the present case in holding that the testator was of sound mind and memory at the time he made his will.

There is no evidence showing that the will was procured by undue influence and restraint by Mrs. Pfandler. In the recent case of Greenlees v. Allen, 341 Ill. 262, the court said:

where it is not based upon circumstances stated by the witness

which will induce a reasonable belief of unsoundness of mind.

Valentine v. Second Baptist Church, 303 Ill. 71. The law presumes

that every man who has arrived at years of discretion is of sound

mind and memory and capable of disposing of his property by will

until the contrary is shown. Wheeler v. Wheeler, 308 Ill. 104. In

Greenleaf v. Greenleaf, 328 Ill. 570, the trial court found that

the testator was at the time of the execution of the will of un-

sound mind, but this was reversed by the Supreme Court, which held

that, where the testator although seriously ill had lucid inter-

vals and the will was executed during a lucid interval, when the

testator knew what he was doing, the will was executed while the

testator was of sound mind.

The evidence shows conclusively that the testator

was well aware of what he was doing when he directed Graham to

draw the will and when he executed it. All the witnesses who saw

him at this time testified to the effect that he was mentally

sound and capable. We cannot reasonably conclude that he was

mentally unsound when he signed the will at about two o'clock

p. m. from the fact that afterwards at about eight o'clock a. m.

he began to enter into his dying struggles. It is a matter of

common knowledge that a person suffering from heart disease, as

Graham was, may even up to a very short time before death be en-

tirely clear mentally and fully capable of transacting business.

The decision in any case of this character rests

peculiarly upon the facts in that case. The Chancellor was fully

justified in the present case in holding that the testator was of

sound mind and memory at the time he made his will.

There is no evidence showing that the will was pre-

pared by undue influence and testified by Mrs. Wheeler. In

the recent case of Greenleaf v. Greenleaf, 341 Ill. 282, the court said:

"Undue influence which justifies setting aside a will must be such as to deprive the testator of his free agency. It must be such as to destroy the freedom of his purpose and render the instrument more the will of another than of his own. It must be directly connected with the execution of the will and must operate at the time the will was made, producing a perversion of the testator's mind. Advice or persuasion will not vitiate a will freely and understandingly made. (Flanigan v. Smith, 337 Ill. 572; Pollock v. Pollock, 328 id. 179; Gresh v. Acem, 325 id. 474; Jones v. Werth, 319 id. 235; Cunningham v. Derhart, 317 id. 451.)"

The testator's brother, sisters and nieces and nephews lived in Sweden and he was out of touch with them. Mrs. Pfandler had kept house for him for some years. George Pfandler testified that he had known Mr. Sward about twelve or thirteen years and had always been around with him; that when he was younger Mr. Sward used to buy him clothes and toys and gave him money to spend; that he visited Sward at the hospital every other day and talked with him each time he was there; that whenever his mother was not with him, Mr. Sward would always ask as to how she was. Sometimes he called the witness "Sonny" or something like that. Sward was evidently very fond of the son, treating him in many ways as if he were his own son. Sward told Mr. Graham that Mrs. Pfandler was the only one who had ever done anything for him. We find no evidence to support the allegations of undue influence.

The decree of the chancellor was proper and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

"Under influence which testifies against a will made as such as to deprive the testator of his free agency. It must be such as to deprive the testator of his free agency and render the testament made the will of another than of the testator. It must be directly connected with the execution of the will and must operate at the time the will was made, producing a perversion of the testator's mind. Advice or persuasion will not vitiate a will freely and understandingly made. (Harrison v. Smith, 257 Ill. 575; Pollock v. Pollock, 388 Ill. 179; Green v. Green, 388 Ill. 474; Jones v. Worth, 319 Ill. 522; Cunningham v. Stewart, 317 Ill. 431.)"

The testator's brother, sisters and niece and nephews lived in Sweden and he was out of touch with them. Mrs. Thandier had kept house for him for some years. George Thandier testified that he had known Mr. Ward about twelve or thirteen years and had always been around with him; that when he was younger Mr. Ward used to buy him clothes and toys and gave him money to spend; that he visited Ward at the hospital every other day and talked with him each time he was there; that whenever his mother was not with him, Mr. Ward would always ask as to how she was. Sometimes he called the witness "Henry" or something like that. Ward was evidently very fond of the son, treating him in every way as if he were his own son. Ward told Mr. Green that Mrs. Thandier was the only one who had ever been anything for him. We find no evidence to support the allegations of undue influence.

The terms of the chancellor was proper and it is

affirmed.

WILLIAM C.

Washburn, J. L., and O'Connor, J., concur.

34754

DAVID SELIC,
Defendant in Error,

vs.

B. FRIEDMAN and MORRIS BROSTOFF,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 6221

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment entered after trial by the court for \$500.40 in a suit upon a promissory note. The note was dated August 11, 1926, signed by defendant Friedman to the order of the defendant Brostoff and endorsed by Brostoff and delivered to plaintiff. It fell due two years after date, which would be August 11, 1928.

Judgment by confession was first entered, but upon motion supported by affidavit this judgment was set aside and defendants were given leave to defend. The only defense asserted by the affidavit of merits is that Brostoff signed the note as endorser and that under the Negotiable Instruments act notice of dishonor must be given to an endorser within a certain period of time and that the statute had not been complied with in this respect.

Upon trial plaintiff testified that some time before the note fell due he placed it in the bank for collection; that he called at the bank on Saturday, August 11, 1928, the day the note matured, and was told that it had not been paid; that on the following Monday he called Brostoff over the 'phone and told him that the note had not been paid by Friedman, the maker, and that Brostoff promised he would see what he could do; that he subsequently had another talk with Brostoff in Friedman's house and Friedman explained that he was tied up financially and as soon as he could the note would be paid.

Brostoff denied that he was notified on Monday, as

DAVID SMITH, Defendant in Error.

vs.

D. THOMAS and MORRIS BROOKS, Plaintiffs in Error.

ORDER TO RETURN TO COURT

OF CHICAGO.

1932 A. 1005

MR. JUSTICE REGULARLY DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment entered after trial by the court for \$500.00 in a suit upon a promissory note. The note was dated August 11, 1926, signed by defendant Wicksman to the order of the defendant Brooks and endorsed by Brooks and delivered to plaintiff. It was due two years after date, which would be August 11, 1928.

Judgment by confession was first entered, but upon motion supported by affidavit this judgment was set aside and defendants were given leave to defend. The only defense asserted by the affidavit of service is that Brooks obtained the note as a forger and that under the applicable provisions not notice of dishonor must be given to an indorser within a certain period of time and that the statute had not been complied with in this respect.

Upon trial plaintiff established that some time before the note fell due he placed it on the bank for collection, that he called at the bank on Saturday, August 11, 1928, to pay the note matured, and was told that it had not been paid; that on the following Monday he called Brooks' over the telephone and that Brooks' note had not been paid by Wicksman, the maker, and that Brooks' promise he would see that it could be paid; that he subsequently filed another suit with Brooks' in Wicksman's name and Brooks' filed a plea that he was tied up financially and as soon as he could the note would be paid.

Brooks' denied that he was called on August 11, 1928, and

plaintiff said, and states that the first time he was notified was September 21st. Two other witnesses, one being the defendant Friedman, gave evidence which it is said tends to support Brostoff's story. One of these witnesses testified that he was present at a conversation between plaintiff and Brostoff in October and that plaintiff made some statement inconsistent with his evidence that he had notified Brostoff on the Monday following the Saturday on which the note fell due, although this witness, when asked the direct question, testified that plaintiff did not say that he had not given notice. Defendant Friedman testified to another interview, but admitted that plaintiff did not at this time say that he had not given notice to Brostoff.

The trial court would have been amply justified in finding that notice was given. The court indicated that he was of the opinion that notice had been given, but was uncertain whether such notice could be given orally. Paragraph 117, chapter 98, Negotiable Instruments, Cahill, provides that such notice may be oral.

Notice must be given before the close of business hours on the day following the day the note matures, so that notice on Monday would comply with the statute. Negotiable Instruments, chapter 98, paragraph 124, Cahill.

After hearing the evidence the trial was continued for the purpose of permitting the lawyers to submit citations to the court. At this second hearing there was much argument and talk as to the facts giving rise to the issuance of the notice and at this time there was discussion as to whether Brostoff was an endorser entitled to notice or merely an accommodation endorser and under the statute not entitled to notice. We are inclined to hold that Brostoff was a regular endorser, entitled to notice, and that the evidence showed that such notice was given. In Dazey v. Williams,

plaintiff said, and states that the first time he was notified was September 1941. Two other witnesses, one being the defendant Friedman, gave evidence which is in said books to support plaintiff's story. One of these witnesses testified that he was present at a conversation between plaintiff and himself in October and that plaintiff made some statement inconsistent with his evidence that he had notified himself on the Monday following the Saturday in which the note fell due, although this witness, when asked the direct question, testified that plaintiff did not say that he had not given notice. Defendant Friedman testified to another interview, but admitted that plaintiff did not at this time say that he had not given notice to himself.

The trial court would have been easily justified in finding that notice was given. The court indicated that he was of the opinion that notice had been given, but was uncertain whether such notice could be given orally. Paragraph 17, chapter 98, negotiable instruments, which provides that such notice may be oral.

Notice must be given before the close of business hours on the day following the day the note matures, so that notice on Monday would comply with the statute. Negotiable instruments, chapter 98, paragraph 184, Civil.

After hearing the evidence the trial court was well qualified for the purpose of permitting the lawyers to submit questions to the court. At this second hearing there was much argument and talk as to the facts giving rise to the issuance of the notice and at this time there was discussion as to whether plaintiff was an endorser entitled to notice or merely an accommodation holder and under the statute not entitled to notice. We are inclined to hold that plaintiff was a regular endorser, entitled to notice, and that the evidence showed that such notice was given. Maxey v. Williams.

252 Ill. App. 329, it was held that in this class of cases the defendant is limited to the defense made by his pleadings.

It is obvious that plaintiff was not entitled to judgment by confession against the defendant Brostoff, and the attorneys' fees amounting to \$20 included in that judgment should not be taxed against him. As he appeared upon the trial and made his defense, which was heard by the court, we can enter such judgment in this court as we may deem proper. We therefore hold that, if plaintiff will within ten days from the filing of this opinion remit ^{from} the amount of his judgment the sum of \$20, judgment for the amount thus reduced will be affirmed; otherwise it will be reversed and the cause remanded.

**AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.**

Matchett, P. J., and O'Connor, J., concur.

302 Ill. App. 382, it was held that in this class of cases the defendant is limited to the defense made by his pleadings.

It is obvious that plaintiff was not entitled to

judgment by confession against the defendant "except", and the attorneys' fees amounting to \$50 included in that judgment should

not be taxed against him. As he appeared upon the trial and

made his defense, which was heard by the court, we can enter such judgment in this court as we may deem proper. We therefore

hold that, if plaintiff will within ten days from the filing of this opinion remit the amount of his judgment the sum of \$20.

Judgment for the amount thus reduced will be affirmed; otherwise

it will be reversed and the cause remanded.

REVEREND AND HONORABLE
JUDGES OF THE COURT

McCabe, P. J., and O'Connor, J., concur.

34766

ROBERT H. GOOD,
Defendant in Error,

vs.

A. R. RAPP,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 622²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant gave plaintiff a promissory note for \$1007.10, dated November 6, 1929, due sixty days after date. The note not having been paid judgment by confession was entered. Subsequently, on filing petition and affidavit leave was given to defend. Upon trial by the court the issues were found for plaintiff and judgment was entered against defendant for \$1130.10, the trial court reducing somewhat the attorneys' fees provided for in the judgment note.

The defense asserted was that the note was obtained from defendant by fraud, deceit and misrepresentation, and that there was no good and valuable consideration for it. The court could properly find that plaintiff is in the business of an advisor in matters of insurance, working for himself; that about October, 1928, he communicated with defendant concerning a readjustment of defendant's life insurance, advising that defendant wait until September, 1929, before changing any of his policies. About a year later plaintiff had a conversation with defendant regarding this insurance and explained a proposition which involved cancelling certain old policies and taking out new ones. Defendant was of the opinion that this appeared to be a good business proposition and told plaintiff to go ahead. Pursuant to this conversation plaintiff procured two policies of life insurance issued by the Prudential Insurance company and delivered them to defendant on November 6, 1929. One of these policies was for \$5,000 and the other for \$25,000. The premium on these amounted to \$1007.10. Defendant gave plaintiff the

MEMORANDUM TO HONORABLE JUSTICE

OF CHICAGO.

2001A.022

ROBERT H. GOOD,
Defendant in Error.

vs.

A. H. RAFF,
Plaintiff in Error.

MR. JUSTICE ROBERT H. GOOD, CHIEF JUSTICE OF THE COURT.

Defendant gave plaintiff a promissory note for \$1000.00 dated November 5, 1932, due sixty days after date. The note not having been paid judgment by confession was entered. Subsequently, on filing petition and affidavit leave was given to defendant upon trial by the court the issues were found for plaintiff and judgment was entered against defendant for \$1000.00, the trial court regarding somewhat the attorney's fees provided for in the judgment note.

The defense asserted was that the note was obtained from defendant by fraud, deceit and misrepresentation, and that there was no good and valuable consideration for it. The court could properly find that plaintiff is in the business of an adjuster in matters of insurance, working for himself, that about October, 1932, he communicated with defendant concerning a reinsurance of defendant's life insurance, advising that defendant will still be in business, before concluding any of his policies. About a year later plaintiff had a conversation with defendant regarding this insurance and explained a proposition which involved converting certain old policies and issuing new ones. Defendant was of the opinion that this seemed to be a good business proposition and told plaintiff to go ahead. Plaintiff to this conversation plaintiff procured two policies of life insurance issued by the Industrial Insurance Company and delivered them to defendant on November 5, 1932. One of these policies was for \$5,000 and the other for \$2,500. The premium on these amounted to \$100.00. Defendant gave plaintiff the

promissory note in question for the amount, whereupon plaintiff paid the insurance premiums to the agent of the Insurance company.

The note fell due January 6, 1930, and the day thereafter plaintiff received a letter from defendant to the effect that he wished to cancel the \$25,000 policy but would keep the \$5,000 policy provided the price was right. Defendant did not return the \$25,000 policy to the Prudential company until sometime in February, 1930, approximately thirty days after the maturity of the note and after he had learned of the pendency of this suit. At the time of the trial the \$5,000 policy was still in full force and effect and in defendant's possession. The premium for this \$5,000 policy was included in the amount of the note.

The legal principles are well settled. In an action on a negotiable promissory note by the holder, the introduction of the note in evidence makes out a prima facie case, entitling the plaintiff to recover in the absence of countervailing proof. Victor v. Warner, 248 Ill. App. 35. The burden of proving failure of consideration is upon the defendant. Miles & Miles, Inc., v. Meyer, 252 Ill. App. 395; Pierik v. Mueller, 201 Ill. App. 108; Wilson v. Wilson, 201 Ill. App. 478. A promissory note constitutes an acknowledgment of a valid indebtedness for an adequate consideration, and the defendant in order to show want of consideration must establish such defense by a preponderance of the evidence. Chicago T. & T. Co. v. Ward, 113 Ill. App. 327; National Bond & Investment Co. v. Lanners, 253 Ill. App. 262.

There was no evidence tending to support the defense that the note was procured from defendant by fraud, deceit and misrepresentation. The evidence not only failed to show want of consideration, but affirmatively proved that plaintiff advanced the premiums for defendant for the \$30,000 of life insurance, and that the note was given to plaintiff to make this good. If after the

policies were delivered defendant desired to cancel them, he should have taken the matter up with the Insurance company. What he did with the policies was of no concern to plaintiff. The evidence tended to show that both policies were in full force and effect for nearly four months after they were issued, during which time defendant had the full protection of the insurance because plaintiff had advanced the money for the premiums. Furthermore, defendant at the time of the trial still retained the \$5,000 policy, for which plaintiff had paid the premium. Defendant in his brief admits that the transaction was simply a loan by plaintiff to defendant to enable defendant to take out new insurance. This may be true and it follows, therefore, that defendant should repay the loan to plaintiff.

Counsel for defendant in his brief has overlooked our rule requiring the parties to be designated in this court as in the trial court.

The finding of the court was sustained by the evidence and the judgment was proper and it is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

policies were delivered defendant desired to cancel them, he should
 have taken the matter up with the insurance company. What he did
 with the policies was of no concern to plaintiff. The evidence
 tended to show that both policies were in full force and effect for
 nearly four months after they were issued, during which time de-
 fendant had the full protection of the insurance because of plaintiff
 had advanced the money for the premiums. Furthermore, defendant at
 the time of the trial still retained the \$8,000 policy, for which
 plaintiff had paid the premium. Defendant in his brief asserts that
 the transaction was simply a loan by plaintiff to defendant to
 enable defendant to take out new insurance. This may be true and
 if follows, therefore, that defendant should repay the loan to
 plaintiff.

Counsel for defendant in his brief has overlooked our
 rule regarding the parties to be designated in this court as in the
 trial court.

The finding of the court was sustained by the evidence
 and the judgment was proper and it is affirmed.

AFFIRMED.

Mitchell, F. J., and C. Conner, J., concur.

34821

JOHN RUIKO,

Appellee,

vs.

IGNATIUS IVAN, JOHN FRYER and
PETER FRYER, Doing Business as
Ivan and Fryer Brothers.
On Appeal of IGNATIUS IVAN and
JOHN FRYER,

Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 622³

MR. JUSTICE McSURKLY DELIVERED THE OPINION OF THE COURT.

Plaintiff in a fourth class suit in the Municipal court tried by the court had judgment against Ignatius Ivan and John Fryer for \$166.67, from which they appeal.

The evidence tends to show that defendants are real estate brokers. Plaintiff, not a licensed broker and employed elsewhere, happened to be in defendants' office when a Mr. Benjamin Harrison came in and listed a piece of property with defendants for sale at \$1100. After Harrison left plaintiff said to Ivan that he thought he could get a buyer for the property and was told by Ivan to go ahead and procure a purchaser and they would pay him two-thirds of whatever they would make on the sale. Although there is some dispute as to who was present at this time, yet we think it is sufficiently shown that John Fryer was also present. Plaintiff within a few days thereafter procured a sale of the property to a Mr. Urbanas for \$1300. Defendants received a commission of \$50, and, as plaintiff claims, also a profit on the sale of \$200, or altogether \$250, of which he claims he is entitled to two-thirds or \$166.67, which is the amount awarded him upon the trial.

Defendants' version is that plaintiff was entitled only to divide the commissions and not to ^{any} share in the profits on the sale. Defendant Ivan testified that after the talk with plain-

RECEIVED FROM MUNICIPAL COURT

OF CHICAGO.

2001.1.22

JOHN WYATT, Associate.

10.

IGNATIUS IVAN, JOHN WYATT and
PETER WYATT, Doing Business as
Ivan and Wyatt Brothers.
On Appeal of IGNATIUS IVAN and
JOHN WYATT, Appellants.

MR. JUSTICE HASSELMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in a former case suit in the Municipal Court
tried by the court had judgment against Ignatius Ivan and John Wyatt
for \$100.00, from which they appeal.

The evidence tends to show that defendants are real

estate brokers. Plaintiff, not a licensed broker and employed
elsewhere, happened to be in defendant's office when a Dr. Harrison
Harrison came in and listed a piece of property with defendant for
sale at \$100. After Harrison left plaintiff said to Ivan that he
thought he would get a buyer for the property and was told by Ivan
to go ahead and procure a purchaser and they could pay him two-
thirds of whatever they would make on the sale. Although there is
some dispute as to who was present at this time, yet we think it is

undoubtedly known that John Wyatt was also present. Plaintiff
within a few days thereafter procured a sale of the property to a
Mr. Urban for \$150. Defendant received a commission of \$50,
and, as plaintiff claims, also a profit on the sale of \$20, or
altogether \$70, of which he claims he is entitled to two-thirds
or \$100.00, which is the amount awarded him upon the trial.

Defendant's version in that plaintiff was entitled
only to divide the commission and not to share in the profit on
the sale. Defendant Ivan testified that after the sale with plain-

tiff he sold the lot to a Mr. Bart who in turn sold it to Mr. Urbanas, and that he, Ivan, made no profit.

Plaintiff's version is supported by some papers which are in the record. Urbanas testified that he purchased the property through the efforts of plaintiff, and that the defendant Ivan gave him a statement referring to the sale. This is on the letter-head of Ivan and Fryer Brothers and contains a statement that the property was sold by Harrison to Urbanas for \$1300. Also there is in evidence the real estate contract between Harrison and his wife and Urbanas, in which Urbanas agreed to buy the property for \$1300. There is also a statement from Ivan and Fryer Brothers to Mr. and Mrs. Harrison, showing the account between them and giving the selling price at \$1100 and the real estate commission at \$50. Plaintiff testified that all the parties were present when this statement to Urbanas was made out and delivered to him and when this latter statement to Harrison and wife was also made out and delivered to them.

The trial court which heard the evidence evidently gave credence to the version of plaintiff and found accordingly.

Only three points are presented by defendants' brief. It is argued that the court should have dismissed the suit on the ground that plaintiff was not a licensed real estate broker. Plaintiff was suing on a special agreement on an isolated transaction. It was a suit for a share of the profits and therefore plaintiff was not obliged to have a real estate broker's license in order to recover. Killen v. Irmiter, 233 Ill. App. 116. In Gross v. Strauss, 208 Ill. App. 263, where the facts were very similar to those before us, it was held that a plaintiff operating without a real estate broker's licence can recover upon a promise made to pay him a certain proportion of the commissions received by the defendant from customers.

that he sold the lot to a Mr. Hart who in turn sold it to Mr.

Urbanus, and that he, Urbanus, made no profit.

Plaintiff's version is supported by some papers which

are in the record. Urbanus testified that he purchased the prop-

erty through the efforts of plaintiff, and that the defendant Urban

gave him a statement referring to the sale. This is on the letter-

head of Ivan and Fryer Brothers and contains a statement that the

property was sold by Harrison to Urbanus for \$1500. Also there is

in evidence the real estate contract between Harrison and his wife

and Urbanus, in which Urbanus agreed to pay the property for \$1500.

There is also a statement from Ivan and Fryer Brothers to Mr. and

Mrs. Harrison, showing the account between them and giving the bal-

ing price of \$1100 and the real estate commission at \$60. Plain-

tiff testified that all the parties were present when this state-

ment to Urbanus was made out and delivered to him and when this

latter statement to Harrison and wife was also made out and delivered

to them.

The trial court which heard the evidence evidently

gave credence to the version of plaintiff and found accordingly.

Only three points are presented by defendants' brief.

It is argued that the court should have dismissed the suit on the

ground that plaintiff was not a licensed real estate broker.

Plaintiff was suing on a special agreement on an isolated transac-

tion. It was a suit for a share of the profits and therefore

plaintiff was not obliged to have a real estate broker's license

in order to recover. Kilian v. Kilian, 235 Ill. App. 116. In

Gross v. Strawn, 308 Ill. App. 522, where the facts were very

similar to those before us, it was held that a plaintiff operating

without a real estate broker's license can recover upon a promise

made to pay him a certain proportion of the commissions received

by the defendant from customers.

It is next claimed that this was an illegal agreement. There is no evidence of this; rather, the evidence shows that the seller was willing to accept \$1100. There was no concealment of the profit. All of the parties were present at the time the transaction was closed. The seller knew he was getting \$1100 and the buyer, of course, knew he was paying \$1300 for the property. A similar transaction was involved in Strassheim v. Reutlinger, 198 Ill. App. 258, where it was held that the right of the broker to recover his commission against the vendor is not affected by a secret agreement between the broker and vendor that, unknown to the purchaser, a certain sum out of the supposed purchase price was to go to such broker; that the apparent deception of the purchaser does not affect the vendor's liability. The court could conclude in the instant case that it was agreeable to both the vendor and the purchaser that the defendant brokers should make the difference between the price at which the vendor listed the property and the price which the purchaser paid. See also O'Neill v. Sinclair, 54 Ill. App. 298.

It is next stated that the judgment is improper as entered against two defendants and there is no evidence of any joint liability. Under section 54, chapter 110, Practice act, which by Rule 22 of the Municipal court is made applicable to proceedings in the Municipal court, it is provided that in actions upon contracts against two or more defendants proof of joint liability shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by a plea denying joint liability. No such plea was filed in the instant case, but in Beller v. O'Connor, 157 Ill. App. 46, it is held that the effect of filing such plea is to cast the burden of proving such joint liability upon the plaintiff; and in Powell Co. v. Finn, 198 Ill. 567, it

It is next claimed that this was an illegal agreement. There is no evidence of this; rather, the evidence shows that the seller was willing to accept \$1000. There was no concealment of the profit. All of the parties were present at the time the transaction was closed. The seller knew he was selling \$1000 and the buyer, of course, knew he was buying \$1000 for the property. A similar transaction was involved in Whitcomb v. Whitcomb, 125 Ill. App. 238, where it was held that the right of the broker to recover his commission against the vendor is not affected by a secret agreement between the broker and vendor, known to the purchaser, a certain sum out of the supposed purchase price was to go to such broker; that the apparent deception of the purchaser does not affect the vendor's liability. The court could conclude in the instant case that it was impossible to hold the vendor and the purchaser that the latter was deceived since the difference between the price of what the vendor listed the property and the price which the purchaser paid. See Moss O'Neil v. Moss, 125 Ill. App. 238.

It is next stated that the judgment is incorrect as entered against two defendants and there is no evidence of any joint liability. Under section 84, chapter 111, Probate Act, which by Rule 32 of the Rules of the Supreme Court is made applicable to proceedings in the Probate Court, it is provided that in actions upon contracts against two or more defendants proof of joint liability shall not in the first instance be required to establish the liability of judgment, unless such proof shall be rendered necessary by a plea denying joint liability. As such plea was filed in the instant case, but in Miller v. O'Connor, 127 Ill. App. 46, it is held that the effect of filing such plea is to cast the burden of proving each joint liability upon the plaintiff; and in Lowell Co. v. Fitch, 125 Ill. App. 237, it

was held that even in the absence of a plea denying joint liability the evidence must show joint liability of all the defendants to entitle the plaintiff to recover. The evidence in this case tends to show joint liability and that John Fryer was present when the property was listed for sale and the agreement made to pay plaintiff. Although served with summons he did not appear in court upon the trial to dispute plaintiff's claim.

Although the case was somewhat confusedly tried, yet on the whole we are inclined to think that the finding of the court was proper and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

was held that even in the absence of a plea denying joint liability the evidence must show joint liability of all the defendants to entitle the plaintiff to recovery. The evidence in this case tends to show joint liability and that John T. Taylor was present when the property was listed for sale and the agreement made to pay plaintiff. Although served with summons he did not appear in court upon the trial to dispute plaintiff's claim. Although the case was somewhat controversially tried, yet on the whole we are inclined to think that the finding of the court was proper and the judgment is therefore affirmed.

APPROVED.

WATSON, J. J., and O'CONNOR, J., concur.

34830

ALBERT GOLDMAN,
Appellant,

vs.

A. B. HASHMAN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 622⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order setting aside a judgment entered by default in the sum of \$500. The judgment was entered June 5, 1924, and defendant filed his petition to vacate the same August 5, 1930, more than six years after judgment was entered.

Plaintiff argues that the trial court had no jurisdiction to entertain a motion to vacate a judgment after such a length of time. Under section 21, chapter 37, Municipal Court act, it is provided that in the Municipal court a motion to vacate a judgment may be made at any time after thirty days "by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." This section of the statute gives the Municipal court jurisdiction to act upon a petition to vacate a judgment upon equitable grounds, and this has been the practice. Kahn v. Rasof, 253 Ill. App. 546; Simeo v. Mankowitz, 184 Ill. App. 506; Schmalhausen v. Zukowski, 183 Ill. App. 305; Doyle v. Fallows, 207 Ill. App. 5; American Surety Co. v. Bliss, 214 Ill. App. 463. Counter affidavits were filed by plaintiff, and the hearing proceeded as if upon a bill and answer in equity. The question for us to determine is whether the court properly exercised its equitable jurisdiction.

Hashman asserted in his petition that he did not know

ALBERT GOLDMAN,
Appellant,
vs.
A. B. HANSEN,
Appellee.

APPEAL FROM DISTRICT COURT

IN AND FOR THE DISTRICT OF COLUMBIA

1. JUSTICE HANSEN DELIVERED THE VERDICT OF THE COURT.

2. Plaintiff appeals from an order setting aside a

judgment entered by defendant in the case of No. 1. The judgment was entered June 2, 1934, and defendant filed his motion to vacate the same August 2, 1934, whereupon six years after judgment was entered.

3. Plaintiff argues that the trial court was not jurisdiction-

tion to entertain a motion to vacate a judgment after such a length of time. Under section 11, Chapter 57, District Court Act, it is provided that in the summary court a motion to vacate a judgment may be made at any time after thirty days "if a decision to said judgment would require further proceedings for a hearing, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by a trial in equity."

This section of the statute gives the summary court jurisdiction to set upon a decision to vacate a judgment when a hearing is required and this has been the construction of the court in Smith v. Smith, 100 D.C. 111, 112, 113.

Stacy v. Mackowski, 100 D.C. 111, 112, 113, 114.

100 D.C. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

4. The court properly exercised its jurisdiction in setting aside the judgment entered in the case of No. 1.

5. The court properly exercised its jurisdiction in setting aside the judgment entered in the case of No. 1.

of the judgment until July 18, 1930, when he was informed by his bank that his account had been garnisheed; that thereupon he communicated with his attorney who checked the records of the Municipal court and informed petitioner that the records disclosed that on October 29, 1923, a suit was commenced against one A. B. Hashman; that summons was issued against said Hashman and that an alias summons showed that it had been served upon one A. B. Hashman on May 8, 1924, and that judgment was entered against said Hashman on June 5, 1924, in the sum of \$500; that no execution issued upon said judgment until June 21, 1930; that petitioner does not know and "has no manner in which to ascertain" that he is the person against whom the judgment in the above entitled cause was rendered; that he was at no time served with process in said suit and that, if he is the defendant, he has a good and meritorious defense; that he does not know the plaintiff, Albert Goldman, nor has he at any time whatsoever had any business transactions with said Goldman; that he never entered into any agreements or contracts of any form, kind or nature with said Goldman, and therefore believes that he is not the person against whom judgment was entered in the cause. Petitioner further asserted that for more than six years past he has been engaged in business at 4000 West Madison street, Chicago, and is personally present at said place of business from seven o'clock a. m. until seven o'clock p. m. of each day of the year; that he is well known in the neighborhood of his place of business, which bears his name displayed upon a large electric sign in front of said premises; that any process issued against him could easily, without delay, be served upon him any day of the week between the hours of 7:00 a. m. and 7:00 p. m. Petitioner alleged that, if he is permitted to defend, he is willing to prove that he does not know plaintiff nor has he had any business transactions with him of any kind, and that he is not indebted to him in the sum of \$500

of the judgment until July 18, 1930, when he was informed by his bank that his account had been garnished; that thereupon he communicated with his attorney who checked the records of the Municipal Court and informed petitioner that the records disclosed that on October 29, 1928, a suit was commenced against one A. B. Harrison; that summons was issued against said defendant and that an alias summons showed that it had been served upon one A. B. Harrison on May 8, 1928, and that judgment was entered against said defendant on June 8, 1928, in the sum of \$500; that no execution issued upon said judgment until June 21, 1930; that petitioner does not know and "has no manner in which to ascertain" that he is the person against whom the judgment in the above entitled cause was rendered; that he was at no time served with process in said suit and that it is the defendant, he has a good and sufficient defense; that he does not know the plaintiff, Albert Goldman, nor has he at any time whatsoever had any business transactions with said Goldman; that he never entered into any agreement or contract of any kind or nature with said Goldman, and therefore believes that he is not the person against whom judgment was entered in the cause. Petitioner further asserts that for more than six years past he has been engaged in business at 420 West Madison Street, Chicago, and is personally present at said place of business from seven o'clock a. m. until seven o'clock p. m. of each day of the year; that he is well known in the neighborhood of the place of business, which place his name displayed upon a large electric sign in front of said premises; that any process issued against him would easily, without delay, be served upon him any day of the week between the hours of 7:00 a. m. and 7:00 p. m. Petitioner alleged that, if he is permitted to defend, he is willing to prove that he does not know plaintiff nor has he had any business transactions with him of any kind, and that he is not indebted to him in the sum of \$500.

or in any other sum.

A counter affidavit by one of the attorneys for plaintiff was filed, in which he stated that he had checked the city directory and the telephone books of the City of Chicago from 1923 to date and that the only Hashman appearing therein is said A. B. Hashman, whose home is listed at 1057 North LeClaire avenue; that the address appearing on the summons issued out of the Municipal court gave the address of said defendant as 1057 North LeClaire avenue, which was the address of said A. B. Hashman at the time of the summons and which is now the present address of said A. B. Hashman. Another affidavit was introduced, from which it appears that Hashman had on June 16, 1930, made affidavit for the purpose of procuring from the Chicago Title & Trust Company a guaranty policy on the premises at 1057 North LeClaire avenue, in which Hashman stated that he had resided at this number for seven years last past. It also appears in said statement that Hashman swore that he was not the person against whom the judgment was rendered in the courts of record of Cook county, and that there were no judgments against affiant remaining unsatisfied in any of the courts of Cook county or in the State of Illinois.

Inspection of the summons purporting to be served on A. B. Hashman fails to disclose any address, which would seem to be in conflict with the affidavit of the attorney for the plaintiff that the address at North LeClaire avenue was on said summons. It further appears that after the commencement of the suit against Hashman in October, 1923, eight alias summonses ^{were} issued and all of these were returned, "defendant not found." It was not until May 24, 1924, that the return showed that same had been served on A. B. Hashman.

There was sufficient before the trial court to justify a belief that, if the petitioner A. B. Hashman was residing all

or in any other way.

A counter affidavit by one of the attorneys for said city was filed, in which he stated that he had checked the city directory and the telephone books of the City of Chicago from 1923 to date and that the only Hashman appearing therein is said A. B. Hashman, whose home is listed at 1027 North LaSalle Avenue; that the address appearing on the summons issued out of the Municipal Court gave the address of said defendant as 1027 North LaSalle Avenue, which was the address of said A. B. Hashman at the time of the summons and which is now the present address of said A. B. Hashman. Another affidavit was introduced, from which it appears that Hashman had on June 15, 1934, made affidavit for the purpose of procuring from the Chicago Title & Trust Company a guaranty policy on the premises at 1027 North LaSalle Avenue, in which Hashman stated that he had resided at this number for seven years last past. It also appears in said statement that Hashman swore that he was not the person against whom the lawsuit was pending in the courts of Cook County, and that there were no judgments against defendant remaining unsatisfied in any of the courts of Cook County or in the State of Illinois.

Inspection of the summons returned to be served on A. B. Hashman failed to disclose any address, which would seem to be in conflict with the affidavit of the attorney for the plaintiff that the address of North LaSalle Avenue was an old address. It further appears that after the commencement of the suit against Hashman in October, 1933, said filing responses were filed and all of these were returned, "defendants not found." It was not until May 24, 1934, that the return showed that summons had been served on A. B. Hashman.

There was testimony before the trial court to the effect a policy had been issued by the defendant A. B. Hashman who resided at

this time at 1057 North LeClaire avenue and was at the same time engaged in business at 4000 West Madison street, Chicago, and was constantly in attendance upon his business during all of this time, that it was very doubtful whether petitioner was the party against whom plaintiff sought to recover. In a number of cases it has been held that in proceedings under section 89 of the Practice act the return of an officer cannot be questioned. Marabia v. Thompson Hospital, 309 Ill. 147, and cases there cited. Ordinarily, return of service cannot be impeached by the uncorroborated testimony of the party served with process. Moore v. Robbins Machinery & Supply Co., 252 Ill. App. 24; Karnik v. Cusack, 317 Ill. 362. But the petitioner here is not so much questioning the bailiff's service as asserting that he is not the man against whom judgment was entered. He denies knowing the plaintiff or ever having had any business relations with him. This denial, in connection with the facts above referred to, namely, that the petitioner could readily have been served with summons, and the fact that eight summonses were returned "not found," tends to support the conclusion of the trial court which vacated the judgment and permitted petitioner to file his affidavit of merits and defend. The order will therefore be affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

34663

BERNARD W. SNOW as Bailiff of the
Municipal Court of Chicago, for the
use of FRED HAYEK,

Appellee,

vs.

LLOYD L. WARFIELD and UNITED STATES
FIDELITY & GUARANTEE CO., a Corpora-
tion, on Appeal of UNITED STATES
FIDELITY & GUARANTEE CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

260 I.A. 622

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants on a bond given in a replevin suit. They were served with process, entered their appearance, and filed their affidavit of merits. Afterwards the case came on for hearing before a jury, the defendants being absent and not represented, and after hearing the evidence the jury returned a verdict finding the issues against the defendants and assessing plaintiff's damages at \$1,000. Judgment was entered on the verdict. Two days afterwards the defendant United States Fidelity & Guarantee Co., the surety on the replevin bond, moved the court to vacate and set aside the judgment, and afterwards, upon the hearing, the motion was denied and the United States Fidelity & Guarantee Co. prosecutes this appeal.

The record is unsatisfactory. Both parties say that after the defendants were served they entered their appearance and demanded a jury trial, and that sometime thereafter plaintiff moved to advance the cause for hearing and that this was done. But there is nothing in the record to show that any such order was entered. On September 10, 1930, a record was filed in this court which the clerk of the trial court certifies to be a complete record. Afterwards, on November 14th, an additional or supplemental record was filed which purports to contain a bill of exceptions or stenographic report of the proceedings. Counsel speak of this as an additional

BERNARD W. BROW as Plaintiff of the
Municipal Court of Chicago, vs. the
Use of Third Party.

Appellee.

vs.

LYNN L. WARRING and UNITED STATES
FIDELITY & GUARANTEE CO., a corpo-
ration, on Appeal of UNITED STATES
FIDELITY & GUARANTEE CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant on

a bond given in a previous suit. They were served with process,

entered their appearance, and filed their affidavits of service.

Afterwards the case came on for hearing before a jury. The defend-

ants being absent and not represented, and after hearing the evi-

dence the jury returned a verdict finding the losses against the

defendants and assessing plaintiff's recovery at \$1,000. Judgment

was entered on the verdict. Two days afterwards the defendant

United States Fidelity & Guarantee Co., the surety on the original

bond, moved the court to vacate and set aside the judgment, and

afterwards, upon the hearing, the motion was denied and the United

States Fidelity & Guarantee Co. prosecuted this appeal.

The record is as follows: Plaintiff's attorney, after notice was given

after the defendants were served they entered their appearance and

demand a jury trial, and the case was set for hearing and trial there

to advance the cause for hearing and trial this was done. But there

is nothing in the record to show that any order was entered.

On September 10, 1910, a record was filed in this court which the

clerk of the trial court certified to be a complete record. After-

wards, on November 14th, an additional or supplementary record was

filed which purports to contain a bill of exceptions or stipulations

report of the proceedings. Counsel speak of this as an additional

bill of exceptions, and there is also reference made to the original bill of exceptions but there is no original bill of exceptions in the record. However, we shall treat the case as though the record was in the condition contended for by counsel on both sides.

It appears that after the case was advanced for trial the defendant Warfield, the principal in the replevin bond, temporarily left the city of Chicago for parts unknown to counsel for defendants, and defendants made a motion before the Chief Justice and later a motion before another Judge of the Municipal court, to continue the case on account of the absence of the principal defendant. Both of these motions, counsel say, were denied. The United States Fidelity & Guarantee Co., in support of its motion to vacate the judgment, filed its petition reciting the retaining of counsel by defendants and the filing of their appearance and affidavit of merits; that the defendants, having asked for a jury trial, assumed that the case would be on the next jury calendar. The person swearing to the petition was associated with counsel for the defendant Guarantee company, and he further sets up in the petition that he had no definite information regarding the proceedings by which the case was set for trial on June 10, 1930; but on the morning of that day defendants' counsel's office was called on the telephone and told that the case was being held for trial before one of the Municipal court Judges. This petition is in the bill of exceptions, from which it also appears that the court before whom the case was to be tried had counsel for defendants notified by telephone; that some of them came to the court room, and when a jury was selected left the court room and refused to defend the case. At that time the court stated the record shows that the case had been on his call on a number of occasions; that Mr. Billett was representing the two defendants the first day the case came up; the court, on his own motion, had the bailiff

bill of exceptions, and there is also reference made to the original bill of exceptions but there is no original bill of exceptions in the record. However, we shall treat the case as though the record was in the condition contended for by counsel on both sides.

It appears that after the case was advanced for trial

the defendant, Bartlett, the principal in the telephone bank, tempo-

rarily left the city of Chicago for some unknown to counsel for

defendants, and defendants made a motion before the Chief Justice

and later a motion before another judge of the Municipal Court, to

continue the case on account of the absence of the principal de-

fendant. Both of these motions, a third way, were denied. The

United States District & Commercial Co., in support of its motion to

vacate the judgment, filed its petition reciting the retaining of

counsel by defendants and the filing of their answer and affidavit

of merit; that the defendants, having asked for a jury trial,

assumed that the case would be on the next jury calendar. The de-

fendant was associated with counsel for the

defendant guarantee company, and he further sets up in the petition

that he had no definite information regarding the proceedings by

which the case was set for trial on June 10, 1936; but on the

morning of that day defendants' counsel's office was called on the

telephone and told that the case was being held for trial before

one of the Municipal Court Judges. This petition is in the bill

of exceptions, from which it also appears that the court before

whom the case was to be tried had counsel for defendants notified

by telephone; that some of them came to the court room, and when a

jury was selected left the court room and refused to return the

case. At that time the court stated the record shows that the

case had been on his call on a number of occasions; that Mr.

Differt was representing the two defendants the first day the

case came up; the court, on his own motion, had the petition

call up the Guarantee company and advise it that the case was on for trial and to send someone over; that counsel did come over and after the jury was sworn to try the case the two counsel representing the defendants walked out of the court room and abandoned the case.

The defendants contend that the statement of claim does not state a cause of action and therefore the judgment should be reversed. But it has been repeatedly held by this court and the Supreme court that in cases of the fourth class in the Municipal court no formal written pleadings are required; that the statement of claim is not the same as a declaration of common law; that it is sufficient if it merely states the account or nature of plaintiff's demand and gives such information as will reasonably inform the defendant of the nature of the case. Enberg v. City of Chicago, 271 Ill. 404; Bridges v. Engers, 167 Ill. App. 425; Kuzmierszyk v. Schlitz Brewing Co., 301 Ill. App. 479; Kappes v. Bacon, 209 Ill. App. 290; Lyons v. Kanter, 210 Ill. App. 78; Evans v. Schwartz, 211 Ill. App. 573; Obermeyer v. Wisconsin Dairy F. Co., 211 Ill. App. 213; McClunn v. Gillespie, 227 Ill. App. 400; Lurie v. Brewer, 243 Ill. App. 525; Edgerton v. Chicago R. I. & P. Ry. Co., 240 Ill. 311. The above cases and others further hold that cases of the fourth class are to be determined from the evidence.

In the instant case the record states that the court and jury heard the evidence, but the evidence is not in the record. We must therefore assume it was sufficient to sustain the verdict and the judgment. If the judgment had been entered by default without evidence, a different question would be presented. We think the statement of claim was sufficient. It set up the execution of the replevin bond filed in the replevin suit and the finding that the right of possession of the property was in the defendant in the replevin suit; that a writ of retorno was issued and returned

call up the Guaranty company and advise it that the case was on
for trial and to meet someone over; that counsel did come over
and after the jury was sworn to try the case the two counsel re-
sented the defendant's trial out of the court room and abandoned
the case.

The defendant contends that the statement of claim does
not state a cause of action and therefore the judgment should be
reversed. But it has been repeatedly held by this court and the
Supreme court that in cases of the fourth class in the Municipal
court no formal written pleadings are required; that the statement
of claim is not the same as a declaration of common law; that it is
sufficient if it merely states the account or nature of plaintiff's
demand and gives such information as will reasonably inform the
defendant of the nature of the case. Wagner v. City of Chicago,
271 Ill. 404; Widener v. Widener, 187 Ill. App. 403; Widener v.
Schultz Brewing Co., 261 Ill. App. 472; Widener v. Jacob, 209 Ill.
App. 230; Widener v. Widener, 210 Ill. App. 18; Widener v. Widener,
211 Ill. App. 275; Oppey v. Wisconsin Bank & Co., 211 Ill. App.
213; McGinnis v. Gillespie, 207 Ill. App. 400; Widener v. Widener, 248
Ill. App. 232; Widener v. Chicago & N. W. Ry. Co., 240 Ill. 211.
The above cases and others further hold that cases of the fourth
class are to be determined from the evidence.

In the instant case the record shows that the court and
jury heard the evidence, but the evidence is not in the record, and
must therefore assume it was sufficient to sustain the verdict and
the judgment. If the judgment had been entered by default without
evidence, a different question would be presented. We think the
statement of claim was sufficient. It set up the execution of the
replevin bond filed in the replevin suit and the finding that the
right of possession of the property was in the defendant in the
replevin suit; that a writ of replevin was issued and returned

unsatisfied. We think this statement of claim was sufficient. It is certain that it sufficiently advised defendants of the nature of plaintiff's claim. Defendants had no difficulty in understanding it because they filed their affidavit of merits. They clearly understood what claim was being made against them.

Complaint is also made that the verdict is improper in that it fails to find the amount of the debt as well as the damages, and that the judgment is likewise erroneous in this respect. The verdict is defective as contended, but this does not warrant a reversal of the judgment. The damages here are fixed at the amount of the bond, namely, \$1,000, which is necessarily the amount of the debt. Globe Indemnity Co. v. Kessler, 203 Ill. App. 405; Geo. J. Cooke Co. v. Burke, 148 Ill. App. 155. In the Kessler case the court said (409): "A reversal is urged because the action is one of debt and the judgment should accordingly be in the usual form for the penalty, as the debt, to be discharged on payment of the damages. In Geo. J. Cooke Co. v. Burke, 148 Ill. App. 155, this was treated as matter of form and not ground for reversal." The judgment under these recent authorities is sufficient. Nor do we think there is substantial merit in the defendants' contention that the court erred in denying its motion to vacate the judgment. We have above set forth the facts as they appear in the record as to what was done in the case, and we think it clear that we would not be warranted in holding that it was reversibly erroneous for the court to overrule the defendants' motion.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

unsubstantiated. We think this statement of claim was sufficient. It is certain that it sufficiently advised defendant of the nature of plaintiff's claim. Defendant had no difficulty in understanding it because they filed their affidavit of denial. They clearly understood what claim was being made against them.

Complaint is also made that the verdict is improper in that it fails to find the amount of the debt as well as the damages, and that the judgment is likewise erroneous in this respect. The verdict is defective as contended, but this does not warrant a reversal of the judgment. The damages here are fixed at the amount of the bond, namely, \$1,000, which is necessarily the amount of the debt. Globe Indemnity Co. v. Keweenaw, 200 Ill. App. 408; 200 Ill. 111.

Globe Co. v. Burke, 148 Ill. App. 188. In the former case the court said (408): "A reversal is urged because the action is one of debt and the judgment should accordingly be in the usual form for the penalty, as the debt, so be discharged on payment of the damages. 200 Ill. App. 188. This was located as

matter of form and not ground for reversal." The judgment under these recent authorities is sufficient. Nor do we think there is substantial merit in the defendant's contention that the court erred in denying its motion to vacate the judgment. We have those set forth the facts as they appear in the record as it was made in the case, and we think it clear that we would not be warranted in holding that it was reversible error for the court to overrule the defendant's motion.

The judgment of the District Court of Chicago is

affirmed.

34693

JOHN MacKENZIE,
Appellee,

vs.

JUSTIN T. McCARTHY,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

200 I.A. 323'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On June 2, 1928, plaintiff caused judgment by confession to be entered on a promissory note against the defendant for \$4,425. Afterwards, on motion of the defendant, the judgment was opened up and he was given leave to defend. There was a jury trial and a verdict in plaintiff's favor for \$3,598; judgment was entered on the verdict and the defendant appeals.

The record discloses that on December 1, 1926, defendant being indebted to the plaintiff for money borrowed, on that day executed and delivered his twelve promissory notes payable to defendant's order and by him endorsed and delivered. Eleven of the notes were for \$150 each, due monthly, and the twelfth note, being the note in suit, was for \$4,350, due one year after date. The payment of the notes was secured by a junior mortgage on real estate of even date. When the first note became due it was paid by the defendant, and a short time thereafter, namely, January 12, 1927, the defendant conveyed the property by warranty deed to Raymond H. Parker, which conveyance was made subject to the incumbrance evidenced by the notes, and after the conveyance Parker paid the ten remaining notes for \$150 each as they came due. The evidence shows also that Parker paid to plaintiff all interest that came due on the mortgage and made certain payments of principal on the note in suit. When the note came due December 1, 1927, the time of payment was extended for a month to January 1, 1928, and about the end of that month was again extended to February 1, 1928,

JOHN WACHENIK,
Appellee.

vs.

JUSTIN T. MCCARTHY,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

100-111-333

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On June 2, 1926, plaintiff secured judgment by conser-
sion to be entered on a promissory note against the defendant for
\$4,483. Afterwards, on motion of the defendant, the judgment was
opened up and he was given leave to defend. There was a jury trial
and a verdict in plaintiff's favor for \$4,668; judgment was entered
on the verdict and the defendant appeals.

The record discloses that on December 1, 1925, defendant
and being indebted to the plaintiff for money borrowed, on that day
executed and delivered his twelve per cent promissory note payable to de-
fendant's order and by him endorsed and delivered. Eleven of the
notes were for \$100 each, one hundred, and the twelfth note, being
the note in suit, was for \$4,568, due one year after date. The
payment of the notes was secured by a junior mortgage on real es-
tate of even date. When the first note became due it was paid by
the defendant, and a short time thereafter, namely, January 19,
1927, the defendant conveyed the property by warranty deed to
Raymond H. Parker, which conveyance was made subject to the in-
cumbrance evidenced by the notes, and after the conveyance Parker
paid the ten remaining notes for \$100 each as they came due. The
evidence shows also that Parker paid to plaintiff all interest that
came due on the mortgage and made certain payments of principal on
the note in suit. When the note came due December 1, 1926, the
time of payment was extended for a month to January 1, 1927, and
about the end of that month was again extended to February 1, 1927.

and other monthly extensions were made, the last extending the time of the payment to April 1, 1928. All of these extension agreements were made between Parker and the plaintiff. Afterwards the note in question being overdue and unpaid, Parker executed two quit claim deeds conveying the premises to plaintiff; the first deed was dated August 10, 1927, and conveyed a part of the premises, and the second was executed and delivered August 25, 1928, and conveyed the balance of the premises.

Plaintiff gave testimony to the effect that the time of payment of the note was extended with the knowledge and consent of the defendant. This was denied by defendant and there is other evidence in the record to the effect that the defendant knew nothing about the fact that the time of payment had been extended until about June 1, 1928, a few days before the judgment was confessed. When plaintiff called on the defendant and demanded payment, defendant testified that he at that time told plaintiff he thought the note had been paid by Parker, but when advised that this had not been done he tendered to plaintiff \$3,650 in payment of the note, claiming that certain deductions should be allowed. The evidence is further to the effect that two quit claim deeds given by Parker to plaintiff above mentioned were given as security for an indebtedness owed by Parker to plaintiff and were not intended to be a conveyance of the premises.

The defendant contends that by reason of the fact that plaintiff, by agreement with Parker, for a consideration extended the time of the payment of the note without defendant's knowledge or consent, defendant was released from personal liability on the note. It is the law that if the time of payment is extended by agreement between the mortgagee and the grantee, for a consideration, where the grantee has assumed and agreed to pay the mortgage,

and other monthly extensions were made. The last extending the time of the payment to April 1, 1938. All of these extension agreements were made between Parker and the Plaintiff. Afterwards the note in question being overdue and unpaid, Parker executed two quit claim deeds conveying the premises to Plaintiff; the first deed was dated August 10, 1937, and conveyed a part of the premises, and the second was executed and delivered August 23, 1938, and conveyed the balance of the premises.

Plaintiff gave testimony to the effect that the time of payment of the note was extended with the knowledge and consent of the defendant. This was denied by defendant and there is other evidence in the record to the effect that the defendant knew nothing about the fact that the time of payment had been extended until about June 1, 1938, a few days before the judgment was rendered. When Plaintiff called on the defendant and demanded payment, defendant testified that he at that time told Plaintiff he thought the note had been paid by Parker, but when advised that this had not been done he tendered to Plaintiff \$3,850 in payment of the note. Plaintiff then certain questions should be allowed. The evidence is further to the effect that two quit claim deeds given by Parker to Plaintiff above mentioned were given as security for an indebtedness owed by Parker to Plaintiff and were not intended to be a conveyance of the premises.

The defendant contends that by reason of the fact that Plaintiff, by agreement with Parker, for a consideration extended the time of the payment of the note without defendant's knowledge or consent, defendant was released from personal liability on the note. It is the law that if the time of payment is extended by agreement between the mortgagee and the grantor, for a consideration, where the grantee has assumed and agreed to pay the mortgage,

the mortgagor is relieved from personal liability unless he consents to the extension, for the reason that the relation of the grantee and the grantor towards the mortgagee is that of principal and surety. Albee v. Gross, 250 Ill. App. 98; Douglas v. Ullsperger, 251 Ill. App. 145; Binga v. Bell, 259 Ill. App. 361; Farmers and Merchants Bank v. Narvid, Number 34642, Appellate Court, First District; Union Mutual Ins. Co. v. Hanford, 143 U. S. 187; Spencer v. Spencer, 95 N.Y. 353. But in the instant case the question whether the extension was made with the assent of the defendant, the mortgagor, was disputed and the jury were instructed that if they found from the evidence that the time of payment had been extended by agreement between plaintiff and Parker without the consent of the defendant, then their verdict should be for the defendant. The jury, by their verdict, in effect found that the extensions had been made by and with the consent of the defendant, and unless we are able to say that their finding is against the manifest weight of the evidence we are not warranted, under the law, in disturbing the judgment.

Upon a careful consideration of all the evidence, we are of the opinion that we would not be warranted in holding that the finding of the jury on this question was against the manifest weight of the evidence. The jury saw and heard the witnesses and were in a better position to determine the truth of the controversy than we are from a reading of the printed page of the record. Their verdict was in favor of the plaintiff and this was approved by the trial Judge. In these circumstances we think we are not warranted, in view of all the evidence, in disturbing the judgment.

The defendant further contends that since the property covered by the mortgage was afterwards conveyed by Parker to the mortgagee, this, under the law, operated as a merger and extinguished the mortgage debt; but we think all of the evidence on the question of the conveyance by Parker shows that it was not intended by Parker

the mortgagee is relieved from personal liability unless he consents to the extension, for the reason that the relation of the trustee and the grantor towards the mortgagee is that of principal and surety. Albee v. Gross, 250 Ill. App. 2d; Conley v. Bismarck, 251 Ill. App. 148; Albee v. Bell, 252 Ill. App. 251; Albee and Bismarck Bank v. Bismarck, Number 2448, Appellate Court, Third District; Union National Life Co. v. Hartford, 141 U. S. 187; Guaranty v. Guaranty, 25 N.Y. 253. But in the instant case the question whether the extension was made with the assent of the defendant, the mortgagee, was disputed and the jury were instructed that if they found from the evidence that the time of payment had been extended by agreement between plaintiff and defendant without the consent of the defendant, then their verdict should be for the defendant. The jury, by their verdict, in effect found that the extension had been made by and with the consent of the defendant, and unless we are able to say that their finding is against the manifest weight of the evidence we are not warranted, under the law, in disturbing the judgment. Upon a careful consideration of all the evidence, we are of the opinion that we would not be warranted in holding that the finding of the jury on this question was against the manifest weight of the evidence. The jury saw and heard the witnesses and were in a better position to determine the truth of the controversy than we are from a reading of the printed page of the record. Their verdict was in favor of the plaintiff and this was approved by the trial judge. In these circumstances we think we are not warranted, in view of all the evidence, in disturbing the judgment. The defendant further contends that since the property covered by the mortgage was afterwards conveyed by Barker to the mortgagee, this, under the law, operated as a merger and extinguished the mortgage debt; but we think all of the evidence on the question of the conveyance by Barker shows that it was not intended by Barker

or plaintiff that the deed should operate as a conveyance but merely as security for indebtedness due from Parker to plaintiff.

On June 2, 1923, judgment by confession was entered for \$4425. Afterwards the judgment was opened up and leave given to the defendant to plead, the judgment to stand as security. Afterwards the case was tried before the jury, and on April 18, 1930, the jury returned their verdict finding the issues for the plaintiff and assessing "Plaintiff's damages at the sum of \$3,598." Afterwards judgment in the usual form was entered on the verdict. The question of usury having been raised by the defendant, plaintiff admitted that there was \$600 in the note for commissions which he was not entitled to and that certain payments were made aggregating \$252 which should be deducted.

In this court the defendant contends that the judgment is not in proper form and cites the case of Cervenka v. Hunter, 185 Ill. App. 547, where it was held that where a judgment by confession was opened and the defendant given leave to plead and it was ordered that the judgment stand as security, and afterwards a trial was had which resulted in a verdict for plaintiff and judgment was entered on the verdict, that the judgment was not in proper form and would be reversed and the cause remanded with directions to enter a proper judgment, but that a new trial would not be awarded. Plaintiff, in his brief, admitted that the judgment is not in proper form and that probably the case ought to be remanded to the trial court with directions to enter the proper judgment; but we think this is unnecessary. No useful purpose could be served by remanding the cause. It is obvious that all understand that the judgment entered on the verdict is in reality the only judgment in the case. The judgment by confession is in effect wiped out.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

The judgment of the Circuit Court of Cook County is affirmed. The judgment by confession is in effect wiped out. The cause. It is obvious that all understand that the judgment entered on the verdict is in reality the only judgment in the case. This is unnecessary. As nearly anyone could be served by remaining court with directions to enter the proper judgment; but we think form and that probably the case ought to be remanded to the trial. Plaintiff, in his brief, admitted that the judgment is not in proper form and would be reversed and the cause remanded with directions to enter a proper judgment, but that a new trial would not be awarded. was entered on the verdict, that the judgment was not in proper form trial was had which resulted in a verdict for plaintiff and judgment was ordered that the judgment stand as security, and afterwards a remission was given and the defendant given leave to plead and it is not in proper form and after the case of Geary v. Whelan. In this court the defendant contends that the judgment \$500 which should be deducted. was not entitled to and that certain payments were made aggregating admitted that there was \$500 in the note for commissions which he The question of entry having been raised by the defendant, plaintiff Afterwards judgment in the usual form was entered on the verdict. Plaintiff and assessing "Plaintiff's damages at the sum of \$2,500." 1930, the jury returned their verdict finding the issues for the defendant. The case was tried before the jury, and on April 18, to the defendant in blood, the judgment to stand as security. for \$4425. Afterwards the judgment was opened up and leave given On June 2, 1938, judgment by confession was entered merely as security for indebtedness due from Barker to plaintiff. of plaintiff that the deed should operate as a conveyance but

34702

SMITH ENGINEERING WORKS,
a Corporation,
Appellee,

vs.

T. FRANK QUILTY and FRANCIS
J. SULLIVAN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 623²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of five promissory notes made by the defendants, brought an action to recover on the five notes. The defendants filed an affidavit of merits in which it was set up that the consideration for the notes had wholly failed; that the notes were given in part payment of a gravel washing machine purchased by defendants from plaintiff, which was used to wash gravel at defendants' gravel pit, and that the machine would not produce marketable gravel and therefore was of no value. There was a jury trial and a verdict and judgment in plaintiff's favor and the defendants appeal.

It appears from the record that about June, 1927, plaintiff and defendants entered into a written contract for the sale and purchase of the gravel washing machine; that afterwards the machine was installed at defendants' plant at Lisle, Illinois, and was used in washing gravel; that before the machine was delivered defendants paid one-third of the purchase price and executed the five notes in question for the balance. It further appears that some trouble was had with the machine after it was installed at defendants' gravel pit, and that plaintiff had a representative there on a number of occasions endeavoring to have the trouble remedied. The machine was used for some time in the fall of 1927 and it was still being used at the time of the trial in May, 1930, although

WITH EXHIBITS
a
Appellants

vs.

T. FRANK GUILTY and FRANCIS
J. SULLIVAN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 623

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of five promissory notes made by the defendants, brought an action to recover on the five notes. The defendants filed an affidavit of merits in which it was set up that the consideration for the notes had wholly failed; that the notes were given in part payment of a gravel washing machine purchased by defendant from plaintiff, which was used to wash gravel at defendant's gravel pit, and that the machine would not produce marketable gravel and therefore was of no value. There was a jury trial and a verdict and judgment in plaintiff's favor and the defendants appealed.

It appears from the record that about June, 1937, plaintiff and defendant entered into a written contract for the sale and purchase of the gravel washing machine; that afterwards the machine was installed at defendant's plant at Elmhurst, Illinois, and was used in washing gravel; that before the machine was delivered defendant paid one-third of the purchase price and executed the five notes in question for the balance. It further appears that some trouble was had with the machine after it was installed at defendant's gravel pit, and that plaintiff had a representative there on a number of occasions endeavoring to have the trouble remedied. The machine was used for some time in the fall of 1937 and it was still being used at the time of the trial in May, 1938, although

there is evidence that it had not worked satisfactorily. The defendants' position was and is that the machine was warranted to turn out a marketable product and that there was a breach of the warranty.

The written contract entered into between the parties for the purchase and sale of the machine contained the following: "CAUTION TO GRAVEL MEN. Not all gravel deposits are commercially washable. Clay is very difficult to remove, particularly where in hard balls or streaks. We do not guarantee that equipment will produce clean aggregate in any particular case except where we have fully investigated the deposit and specifically accept responsibility in writing.

"We will guarantee that material will be produced which is commercially marketable, provided that the equipment is installed according to our instructions and operated according to our instructions.

"Capacity. Unless otherwise specified, we guarantee all machines of our manufacture to produce not less than the minimum capacity at which they are rated (under the conditions specified) in our catalog No.....; provided such machines are properly installed and operated." The contract was printed but before it was signed plaintiff caused to be written the following: "On the understanding that the aggregate to be washed is in accordance with sample submitted."

The evidence shows that a sample was taken from the gravel pit to plaintiff's place of business in Milwaukee, where it was run through one of plaintiff's machines and the evidence is to the effect that there was little or no clay in the sample. There was further evidence to the effect that when the plant was installed at Lisle, and put into operation, there was considerable clay in the product and on this account the product in some cases was not what it should be - some of it not being salable.

The defendants first contend that the court erred in

there is evidence that it had not worked satisfactorily. The defendant's position was and is that the machine was warranted to turn out a marketable product and that there was a breach of the warranty. The written contract entered into between the parties for the purchase and sale of the machine contained the following: "CAUTION TO GRAVEL MAN. Do not allow gravel deposits and comminately washable. Clay is very difficult to remove, particularly where it hard balls or streaks. We do not guarantee that equipment will produce clean aggregate in any particular case except where we have fully investigated the deposit and specifically accept responsibility in writing.

"We will guarantee that material will be produced which is commercially washable, provided that the equipment is installed according to our instructions and operated according to our instructions.

"Likewise, unless otherwise specified, we guarantee all machines of our manufacture to produce not less than the minimum capacity at which they are rated (under the conditions specified) in our catalogues. . . . ; provided that the machines are properly installed and operated." The contract was printed but before it was signed plaintiff caused to be written the following: "In the and regarding that the aggregate to be washed is a second run with sample submitted."

The evidence shows that a sample was taken from the gravel pit to plaintiff's place of business in Illinois, where it was run through one of plaintiff's machines and the evidence is to the effect that there was little or no clay in the sample. There was further evidence to the effect that when the plant was installed at this, and put into operation, there was considerable clay in the product and on this account the product in some cases was not what it should be - some of it was reject material.

The defendant first contended that the contract was

refusing to allow them to file set-off or counter claim. The record discloses that the instant suit was brought December 5, 1927. The trial of the case commenced May 6, 1930, and at the beginning of the trial the defendants asked leave to file a set-off, which the court denied. There was some argument between court and counsel at the time, from which it appears that similar motions had theretofore been made before other Judges of the Municipal court. The nature of the set-off, which it is stated was submitted to the different courts, does not appear in the abstract of record. We are not advised as to what the allegations of the set-off were. However, we have examined the set-off found in the record, and find it sets up substantially the same matters as those alleged in the affidavit of merits. Obviously the matter is not before us for decision. The case was tried on plaintiff's statement of claim and defendants' affidavit of merits, which set up that the machinery did not work properly and was therefore worthless. By this defense, which was in the nature of a recoupment, the defendants sought to show by the evidence that no recovery could be had by plaintiff, and as stated, the jury by their verdict found that the defense had not been proven.

Defendants' counsel in his brief has made thirteen points; but when we come to the argument we find no attempt is made to argue the points, as Rule 19 of this court requires. This rule was prepared with a great deal of care. It provides that the argument which follows the points in the brief should be confined to a discussion of the points made, in the order in which they are made, and that a point made in a brief but not argued may be considered as waived. However, we shall answer the argument made by counsel for defendants. Counsel says that the evidence shows that "the washing machinery would not remove the clay balls of this pit notwithstanding catalogue mentioned in contract said machinery would remove clay balls."

refusing to allow them to file a set-off or counter claim. The record discloses that the instant suit was brought December 5, 1937. The trial of the case commenced May 5, 1938, and at the beginning of the trial the defendant asked leave to file a set-off, which the court denied. There was some argument between court and counsel at the time, from which it appears that similar motions had theretofore been made before other judges of the Municipal court. The nature of the set-off, which it is stated was submitted to the different courts, does not appear in the abstract of record. We are not advised as to what the allegations of the set-off were. However, we have examined the set-off found in the record, and find it sets up substantially the same matters as those alleged in the abstract of motion. Obviously the matter is not before us for decision. The case was tried on plaintiff's statement of claim and defendant's affidavit of merits, which set up that the machinery did not work properly and was therefore worthless. By sole defense, which was in the nature of a recoupment, the defendant sought to show by the evidence that no recovery could be had by plaintiff, and as stated, the jury by their verdict found that the defense had not been proven.

Defendant's counsel in his brief has made thirteen points; but when we come to the argument we find no attack is made to attack the points, as Rule 19 of this court requires. This rule was prepared with a great deal of care. It provides that the argument which follows the points in the brief should be confined to a discussion of the points made, in the order in which they are made, and that a point made in a brief but not argued may be considered as waived. However, we shall answer the argument made by counsel for defendant. Counsel says that the evidence shows that "the working machinery would not remove the clay balls of this bit notwithstanding catapillars mentioned in contract said machinery would remove clay balls."

From the provisions of the contract above quoted, it appears that it was there stated that all gravel deposits were not commercially washable; that clay was very difficult to remove; that the plaintiff did not guarantee the equipment would produce a clean product except where plaintiff had fully investigated the deposit and had specifically accepted the responsibility in writing. We think there is no evidence showing that plaintiff had investigated the deposit and had specifically agreed in writing that the machine would wash the clay from the product. There was evidence that the sample taken to Milwaukee had little or no clay in it, while there was evidence that there was considerable clay in parts of the gravel pit at Lisle. On the disputed question of fact we think the question was properly submitted to the jury. They found the issues for the plaintiff, and unless we are able to say that the finding is against the manifest weight of the evidence, we would not be warranted, under the law, in disturbing the verdict. We have examined all the evidence in the record and are unable to say that the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence.

Complaint is also made that the rulings of the court on certain questions asked by counsel for the defendants of the witness Jones were erroneous. The questions are set out in counsel's brief, but where in the abstract these questions appear, if at all, is not pointed out, though they apparently occurred throughout the trial. Obviously unless it is shown in what connection a question was asked, we would be in no position to pass upon the ruling of the trial judge. What we have said is also applicable to the contention made by the defendants that the court made improper remarks which were prejudicial to them. These remarks are set forth in counsel's brief but no reference is made to the abstract where they may be found, but apparently they too occurred throughout the trial, which

from the provisions of the contract above quoted, it appears that it was there stated that all gravel deposits were not commercially washable; that clay was very difficult to remove; that the plaintiff did not guarantee the equipment would produce a clean product except where plaintiff had fully investigated the deposit and had specifically accepted the responsibility in writing. We think there is no evidence showing that plaintiff had investigated the deposit and had specifically agreed in writing that the machine would wash the clay from the product. There was evidence that the sample taken to witness had little or no clay in it, while there was evidence that there was considerable clay in parts of the gravel pit at issue. On the disputed question of fact we think the question was properly submitted to the jury. They found the issues for the plaintiff, and unless we are able to say that the finding is against the manifest weight of the evidence, we would not be warranted, under the law, in disturbing the verdict. We have examined all the evidence in the record and are unable to say that the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence.

Complaint is also made that the rulings of the court on certain questions asked by counsel for the defendants of the witness Jones were erroneous. The questions are set out in counsel's brief, but where in the record these questions appear, it is all, is not pointed out, though they apparently occurred throughout the trial. Obviously unless it is shown in what connection a question was asked, we would be in no position to pass upon the ruling of the trial judge. What we have said is also applicable to the contention made by the defendants that the court made improper remarks which were prejudicial to them. These remarks are set forth in counsel's brief but no reference is made to the abstract where they may be found, but apparently they too occurred throughout the trial, which

took a number of days, so it is obvious that no intelligent understanding can be had unless we are advised in what connection the remarks were made.

Counsel for plaintiff in their brief contend that the record shows that there was no meritorious defense interposed; that the suit was begun December 5, 1927, and that the defendants were served shortly thereafter; that "By virtue of a jury demand the defendants were enabled to delay the disposition of the cause until the latter part of May, 1930. Further delay has been occasioned by this appeal. The judgment entered in the court below only included interest on the notes up to the time of the institution of this suit;" and that therefore this court should affirm the judgment with 10 per cent damages. We think the record does not warrant the contention made. The verdict of the jury fixed the plaintiff's damages "at the sum of Four thousand six hundred fifty-three and 86/100 Dollars (\$4,653.86), plus accrued interest on plaintiff's Exhibits #1, 2, 3, 4 & 5." The exhibits mentioned in the verdict obviously are the five notes which are the basis of the suit. The verdict clearly means that plaintiff is entitled to \$4,653.86, plus the interest on each of the five notes to be figured up to the date of the verdict. Moreover, there was some evidence to the effect that the plant did not remove the clay from the product ^{as} thoroughly as was contemplated by the terms of the contract.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, F. J., and McSurely, J., concur.

took a number of days, so it is obvious that no intelligent understanding can be had unless we are advised in what connection the remarks were made.

Counsel for Plaintiff in their brief contend that the record shows that there was no meritorious defense interposed; that the suit was begun December 5, 1937, and that the defendants were served shortly thereafter; that they within a fairly reasonable time defendants were enabled to delay the disposition of the cause until the latter part of May, 1938. Further delay has been occasioned by this appeal. The judgment entered in the court below only included interest on the notes up to the time of the institution of this suit;

and that therefore this court should within the judgment with 10 per cent damages. We think the record does not warrant the contention made. The verdict of the jury fixed the Plaintiff's damages at the sum of four thousand six hundred fifty-three and 50/100 Dollars (\$4,653.50), plus accrued interest on Plaintiff's Exhibit A, B, C, D & E. The exhibits mentioned in the verdict obviously are the five notes which are the basis of the suit. The verdict clearly means that Plaintiff is entitled to \$4,653.50, plus the interest on each of the five notes to be figured up to the date of the verdict. Moreover, there was some evidence to the effect that the plaintiff had not remove the clay from the gravel/therefore as was contemplated by the terms of the contract.

The judgment of the Municipal Court of Chicago is affirmed.

ATTEST.

Noted: W. J. and McGowan, J. J. counsel.

34756

GENERAL ACCEPTANCE COMPANY,
a Corporation,
Defendant in Error.

vs.

J. B. GILLUM,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 623³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On October 16, 1929, plaintiff caused judgment to be entered by confession on a promissory note for \$699, which included the amount due on the note by its terms, and \$75 attorney's fees. On November 6th the defendant made a motion to vacate the judgment. The motion was entered and continued, and on December 24th the judgment was opened up and the defendant given leave to defend. The verified petition filed in support of the motion was ordered to stand as defendant's affidavit of merits. February 18, 1930, the case was heard before the court without a jury; the court found that at the date of the rendition of the judgment by confession there was due from the defendant to the plaintiff \$699. Judgment was entered on the finding, plaintiff prayed and was allowed an appeal to this court, which appeal was dismissed by this court on motion of plaintiff. Afterwards this writ of error was sued out.

The judgment was entered on a promissory note which purports to be signed by the defendant and Nora Gillum, and is dated May 7, 1927, payable to the order of the Prudential Construction Co. The note is for \$624 and is payable in monthly installments "at the office of General Acceptance Company." Printed on the back of the note is the following: "Without recourse, pay to the order of General Acceptance Company," and underneath this is the name of the payee.

Defendant's petition in support of his motion to

GENERAL ASSURANCE COMPANY,
a Corporation,
Defendant in Error,

vs.

J. E. MILLER,
Plaintiff in Error.

REPORT TO HONORABLE COURT
OF CHICAGO.

2001 A. 628

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On October 16, 1902, plaintiff caused judgment to be entered by commissioner on a promissory note for \$500, which included the amount due on the note by its terms, and \$75 attorney's fees. On November 6th the defendant made a motion to vacate the judgment. The motion was entered and continued, and on December 24th the judgment was opened up and the defendant given leave to defend. The verified petition filed in support of the motion was ordered to stand as defendant's affidavit of merits. February 18, 1903, the case was heard before the court without a jury; the court found that at the date of the rendition of the judgment by commissioner there was due from the defendant to the plaintiff \$500. Judgment was entered on the finding, plaintiff's prayer and was allowed an appeal to this court, which appeal was allowed by this court on motion of plaintiff. Afterwards this writ of error was sued out. The judgment was entered on a promissory note which purports to be signed by the defendant and bears date, and is dated May 7, 1902, payable to the order of the plaintiff's commission. The note is for \$500 and is payable in monthly installments "at the office of General Assurance Company." Printed on the back of the note is the following: "Without recourse, pay to the order of General Assurance Company," and underneath this is the name of the payee.

Defendant's petition in support of his motion to

vacate the judgment set up that the note which was the basis of plaintiff's claim was not signed by him; that the payee of the note, Prudential Construction Co., sought to have defendant sign the note; that he refused to do so and never authorized anyone to sign the note for him; that a judgment had previously been confessed in the Municipal court of Chicago on the same note in favor of the plaintiff and against the defendant and Nora Gillum; that that judgment had been set aside and hearing had on the merits of the cause, and after hearing the evidence the court found the issues in favor of the defendants and dismissed the suit at plaintiff's costs; and that that judgment was res judicata.

The petition further set up that on April 18, 1927, defendant entered into a written contract with the Prudential Construction Co., under the terms of which the Construction company agreed to do certain work on premises belonging to the defendant. The petition then specified the nature of the work to be done and set up that the work had not been completed and that part of it which had been done was not done in a good and workmanlike manner as provided in the contract; that the note purports to be sold by the payee, Prudential Construction Co., to the plaintiff; that the contract entered into between the Construction company and the defendant for the doing of the work had been assigned by the Construction company to the plaintiff; that afterwards the plaintiff filed a bill in the Circuit court of Cook county to foreclose a mechanic's lien for the work alleged to have been done under the contract and the matter was still pending; that the defendant was ready, willing and able to pay for the work done when it should be completed in accordance with the contract.

On the trial of the case plaintiff offered in evidence a note and what is said to be a certified copy of an order entered by the Municipal court of Chicago, in which the first judgment by

vacate the judgment set up that the note which was the basis of
 plaintiff's claim was not signed by him; that the payee of the
 note, Prudential Construction Co., sought to have defendant sign
 the note; that he refused to do so and never authorized anyone to
 sign the note for him; that a judgment had previously been con-
 ferred in the Municipal Court of Chicago on the same note in favor
 of the plaintiff and against the defendant and here willing; that
 that judgment had been set aside and hearing had on the merits of
 the cause, and after hearing the evidence the court found the
 issues in favor of the defendant and dismissed the suit at
 plaintiff's costs; and that said judgment was rescindable.

The petition further set up that on April 16, 1927,
 defendant entered into a written contract with the Prudential Con-
 struction Co., under the terms of which the Construction Company
 agreed to do certain work on premises belonging to the defendant.
 The petition then specified the nature of the work to be done and
 set up that the work had not been completed and that part of it
 which had been done was not done in a good and workmanlike manner
 as provided in the contract; that the note payable to be sold by
 the payee, Prudential Construction Co., to the plaintiff; that the
 contract entered into between the Construction Company and the
 defendant for the doing of the work had been assigned by the con-
 struction company to the plaintiff; that afterwards the plaintiff
 filed a bill in the Circuit Court of Cook County to foreclose a
 mechanic's lien for the work alleged to have been done under the
 contract and the matter was still pending; that the defendant was
 ready, willing and able to pay for the work done when it should be
 completed in accordance with the contract.

On the trial of the case plaintiff offered in evidence
 a note and was called to be a certified copy of an order entered
 by the Municipal Court of Chicago, to set aside the first judgment by

confession was entered, as above stated. That order, so far as shown by the record as offered by plaintiff, recites that the cause came on for hearing; that on motion of counsel for plaintiff, the court having heard the evidence of both parties, found as a fact that the note on which the judgment was confessed was signed by defendant, J. E. Gillum, and that it was not signed by the defendant in that case, Nora Gillum. Thereupon, the defendant offered in evidence a statement of claim and cognovit filed in the Municipal court in the first case, also a copy of the promissory note, the petition filed in that proceeding by the defendant in support of his motion to vacate the judgment. The bill of exceptions then recites: "The order of court entered in said cause (the first suit) on October 10, 1929, which said order is in words and figures as follows, to-wit: "Trial by court, finding of issues against the plaintiff, judgment on the finding. Judgment by confession of September 30, 1927, vacated and set aside at plaintiff's cost. The order of court entered in said cause (first suit) on November 6, 1929, which said order is in words and figures as follows, to-wit:" Then follows what purports to be part of the order of the Municipal court in which the court finds that the signature on the note of the defendant, J. E. Gillum, was the genuine signature; that the signature of Nora Gillum was not her signature. These are the same findings that the plaintiff offered in evidence above referred to.

The bill of exceptions then recites that the defendant urged that the issues in the two suits were the same and that thereupon the court overruled the defendant's motion to vacate and set aside the judgment and dismissed the suit on the ground of the former adjudication to which the defendant excepted; that thereupon the defendant offered to prove by the defendant Gillum that on the 18th of March, 1927, he had entered into a contract with the

1827 of March, 1927, he had entered into a contract with the
 former adjudication to which the defendant objected; that thereupon
 said the judgment and dismissed the suit on the ground of the
 upon the court overruled the defendant's motion to vacate and set
 urged that the issues in the two suits were the same and that there-
 The bill of exceptions then recites that the defendant
 above referred to.
 These are the same findings that the plaintiff offered in evidence
 that; that the signature of Nora Gilman was not her signature.
 the note of the defendant, J. E. Gilman, was the genuine signa-
 Municipal court in which the court finds that the signature on
 it: "Then follows what purports to be part of the order of the
 6, 1927, which said order is in words and figures as follows, to-
 The order of court entered in said cases (first suit) on November
 September 30, 1927, vacated and set aside at plaintiff's cost.
 plaintiff, judgment on the finding. Judgment by contestation of
 follow, to-wit: Trial by court, finding of issues against the
 on October 10, 1927, which said order is in words and figures as
 follows: "The order of court entered in said cases (the first suit)
 of his motion to vacate the judgment. The bill of exceptions then
 the petition filed in that proceeding by the defendant in support
 put court in the first case, also a copy of the previously note,
 in evidence a statement of claim and cognovit filed in the Munic-
 and in that case, Nora Gilman. Thereupon, the defendant offered
 defendant, J. E. Gilman, and that it was not signed by the defend-
 that the note on which the judgment was confessed was signed by
 court having heard the evidence of both parties, found as a fact
 came on for hearing; that on motion of counsel for plaintiff, the
 shown by the record as offered by plaintiff, recites that the cause
 confessed was entered, as above stated. That order, so far as

Prudential Construction Company, whereby that company agreed to do certain work such as enclosing a porch; certain window improvements, etc., for which work the defendant agreed to pay \$625; that while the Construction company was engaged in doing this work defendant received a communication from plaintiff, the General Acceptance Company, stating that plaintiff had purchased the note in suit from the Prudential company, and that thereupon the defendant notified the Acceptance Company that he had not signed the note; that he agreed to give the note when the work was completed and that it had not yet been completed; that he had learned the contract had been assigned by the Construction company to the Acceptance company and that he then made a demand on the Acceptance company to complete the work; that afterwards on two occasions the Acceptance company sent carpenters who looked over the work and stated they could not remedy the condition of the work, which was then incomplete, and they did nothing. There is then a recitation that the defendant further offered to prove in detail that the work had not been completed in a good and workmanlike manner according to the contract. He further offered to prove that he had not signed the note in suit; that the Acceptance company filed its claim for mechanic's lien in the office of the clerk of the Circuit court and had filed a bill in that court to foreclose the lien. The bill of exceptions further recites that all of the above offered evidence was, upon objection of counsel for plaintiff, excluded. It then continues that the defendant offered to prove by a witness that the work provided for in the contract had not been completed and the part done was not done in a good and workmanlike manner. The bill of exceptions shows no ruling made by the court on this offer.

From what has been stated it appears that the record is in an unsatisfactory condition. The bill of exceptions is in narrative form. Plaintiff contends that the bill of exceptions is not

Prudential Construction Company, whereby that company agreed to do certain work such as enclosing a porch; certain window improvements, etc., for which work the defendant agreed to pay \$250; that while the Construction Company was engaged in doing this work defendant received a communication from plaintiff, the General Acceptance Company, stating that plaintiff had purchased the note in suit from the Prudential Company, and that thereupon the defendant notified the Acceptance Company that he had not signed the note; that he agreed to give the note when the work was completed and that it had not yet been completed; that he had learned the contract had been assigned by the Construction Company to the Acceptance Company and that he then made a demand on the Acceptance Company to complete the work; that afterwards on two occasions the Acceptance Company sent carpenters who looked over the work and stated they could not remedy the condition of the work, which was then incomplete, and they did nothing. There is then a recitation that the defendant further offered to prove in detail that the work had not been completed in a good and workmanlike manner according to the contract. He further offered to prove that he had not signed the note in suit; that the Acceptance Company filed its claim for mechanic's lien in the office of the clerk of the Circuit Court and had filed a bill in that court to foreclose the lien. The bill of exceptions further recites that all of the above offered evidence was, upon objection of counsel for plaintiff, excluded. It then continues that the defendant offered to prove by a witness that the work provided for in the contract had not been completed and the part done was not done in a good and workmanlike manner. The bill of exceptions shows no ruling made by the court on this offer.

From what has been stated it appears that the record is in an unsatisfactory condition. The bill of exceptions is in narrative form. Plaintiff contends that the bill of exceptions is not

properly a part of the record on the ground that counsel for plaintiff was notified by opposing counsel that the bill of exceptions would be "presented" to the trial Judge, but instead of that it was signed by the trial Judge and then held by him for some time thereafter and that this is ground for striking the bill from the record. But counsel has made no motion in this court of this character, so the matter is not before us. A further contention of plaintiff is that where a judgment is entered by confession the note and warrant of attorney is not a part of the record unless preserved in the bill of exceptions: citing Alton Banking & Trust Co. v. Gray, 259 Ill. App. 20. That was an appeal from a judgment entered by the City court of Alton, in which common law pleadings are required, while the instant case is one in the Municipal court of Chicago, where an exhibit may be attached to and made a part of plaintiff's statement of claim. Plaw v. Board, 274 Ill. 232. In the instant case the note in suit was attached to and made a part of plaintiff's statement of claim, and under the system of pleading in the Municipal court it is a part of the record without a bill of exceptions.

A further point is made that where it is sought to weigh the evidence in the court of review, the bill of exceptions must show that it contains all the evidence. This undoubtedly is the law, but in the instant case we are clearly of the opinion that the court committed reversible error in excluding the evidence offered by the defendant. Defendant offered to prove that he had not signed the note and that the construction work had not been completed by the Construction company or the plaintiff; that both of these companies were notified of this fact and plaintiff agreed to complete the work and attempted to do so by sending men to the place, but that the work was not completed. The note in suit is on a blank form, payable to the Construction company at the office of

properly a part of the record on the ground that counsel for plain-
tiff was notified by opposing counsel that the bill of exceptions
would be "presented" to the trial judge, but instead of that it was
signed by the trial judge and then held by him for some time there-
after and that this is ground for striking the bill from the record.
But counsel has made no motion in this court of this character, so
the matter is not before us. A further objection of plaintiff is
that where a judgment is entered by confession the note and return
of attorney is not a part of the record unless preserved in the bill
of exceptions; citing Alton Bank & Trust Co. v. Gray, 289 Ill.
App. 30. That was an appeal from a judgment entered by the City
Court of Alton, in which common law pleadings are required, while
the instant case is one in the Municipal Court of Chicago, where an
exhibit may be attached to and made a part of plaintiff's statement
of claim. Gray v. Hoyle, 274 Ill. 522. In the instant case the
note in suit was attached to and made a part of plaintiff's statement
of claim, and under the system of pleading in the Municipal Court
it is a part of the record without a bill of exceptions.
A further point is made that there is no suggestion
weigh the evidence in the court of review, the bill of exceptions
must show that it contains all the evidence. This undoubtedly is
the law, but in the instant case we are clearly of the opinion that
the court committed reversible error in excluding the evidence of-
fered by the defendant. Defendant offered to prove that he had not
signed the note and that the construction work had not been com-
pleted by the Construction Company or the plaintiff; that both of
these companies were notified of this fact and plaintiff agreed to
complete the work and attempted to do so by sending men to the
place, but that the work was not completed. The note in suit is on
a blank form, payable to the Construction Company at the office of

plaintiff and bears the printed endorsement of the plaintiff Acceptance company. We think there is sufficient evidence tending to show that plaintiff was not the bona fide holder, in due course, under the statute. At least it was a question of fact to be decided by the trial Judge. We think the offered evidence should all have been admitted. Whether the former judgment was res judicata is a question to be decided when all the evidence is received, including the order of the Municipal court, which we think appears in very abbreviated form in the bill of exceptions. The record tends to show that the Municipal court of Chicago in the first suit, after hearing the case on October 10, 1929, entered an order finding the issues against the plaintiff and entering judgment on the finding. From the meager record before us, this seems to have been a final judgment. Afterwards, on November 6, 1929, an order was entered on motion of counsel for plaintiff in which the court found that Gillum had signed the note and that Nora Gillum had not signed the note. Just how the court got jurisdiction to enter this order is not clear. There was no case pending at that time. On the record before us we think this finding is insufficient to warrant a finding that Gillum had signed the note. On the retrial of the case all of the evidence should be brought forth.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

plaintiff and bears the printed endorsement of the plaintiff as
competent company. It is said there is sufficient evidence tending to
show that plaintiff was not the bona fide holder, in the course,
under the statute. At least it was a question of fact to be de-
cided by the trial judge. He finds the offered evidence should
all have been admitted. Whether the former judgment was yes
judicial is a question to be decided upon all the evidence is
received, including the order of the municipal court, which we
think appears in very operative form in the bill of exceptions.
The record tends to show that the municipal court of Chicago in
the first suit, after hearing was made on October 10, 1929, en-
tered an order finding the issue against the plaintiff and enter-
ing judgment on the finding. From the record before us,
this seems to have been a final judgment. Afterwards, on November
6, 1929, an order was entered on motion of counsel for plaintiff in
which the court found that plaintiff had signed the note and that
Gilling had not signed the note. That was the court's finding.
Then to enter this order is not clear. There was no case pending
at that time. On the record before us no such finding is
insufficient to warrant a finding that Gilling had signed the note.
On the return of the case all of the evidence should be received
forth.

The judgment of the municipal court of Chicago is re-
versed and the case is remanded.
REVEREND JUDGE WALKER.
MARCH 2, 1930, and REVEREND J. J. CONANT.

34779

HARRY SAMSKY, Doing Business
as ACORN EXPRESS & VAN CO.,
Defendant in Error,

vs.

FORT DEARBORN AUTOMOBILE INSURANCE
CO., a Corporation,
Plaintiff in Error.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 623

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to reverse a judgment of \$875 rendered against it on the verdict of a jury. Plaintiff brought an action against the defendant in which he filed a praecipe requesting the clerk of the court to issue a summons "in a suit of trespass on the case upon premises." The damages were laid at \$5,000.00.

From the evidence it appears that plaintiff's claim was based on the fact that the defendant had issued its policy of insurance on an automobile truck belonging to the plaintiff, insuring plaintiff against loss on account of any damage to the truck occasioned by fire; that during the life of the policy the truck was damaged by fire and about the next day plaintiff and a representative of the defendant examined the damaged truck and it was agreed that defendant should take the truck and have it repaired at defendant's expense, as required by the policy. The defendant took the truck, turned it over to a repair man who made repairs for which he was paid \$427 by defendant. Plaintiff contended that the damage done had not been properly repaired, while the defendant contended to the contrary.

There was evidence on behalf of the plaintiff tending to show that the defendant refused to permit the plaintiff to obtain the truck unless the plaintiff signed a release of all his claims under the policy, which plaintiff refused to do, claiming,

34770

KARNEY BARNETT, Doing Business
as AGENCY KENTON & VAN CO.,
Defendant in Error.

ALABAMA JUDICIAL COURT
OF CIVIL CASES.

PORT DEARBORN AUTOMOBILE INSURANCE
CO., a Corporation,
Plaintiff in Error.

200 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to re-
verse a judgment of \$275 rendered against it on the verdict of
a jury. Plaintiff brought an action against the defendant in
which he filed a prayer requesting the entry of the court to
issue a judgment "in a suit of trespass on the case upon promises."
The damages were laid at \$2,000.00.

From the evidence it appears that plaintiff's claim
was based on the fact that the defendant had issued its policy of
insurance on an automobile truck belonging to the plaintiff.
Insuring plaintiff against loss on account of any damage to the
truck occasioned by fire; that during the life of the policy the
truck was damaged by fire and about the next day plaintiff and a
representative of the defendant examined the damaged truck and it
was agreed that defendant should take the truck and have it re-
paired at defendant's expense, as required by the policy. The
defendant took the truck, turned it over to a repair man who made
repairs for which he was paid \$227 by defendant. Plaintiff con-
tended that the damage done had not been properly repaired, while
the defendant contended to the contrary.

There was evidence on behalf of the plaintiff tending
to show that the defendant refused to permit the plaintiff to ob-
tain the truck unless the plaintiff signed a release of all his
claims under the policy, which plaintiff refused to do, claiming.

as stated, that all of the repairs had not been made. Evidence on behalf of the defendant was to the effect that at first it did demand a release in full from the plaintiff as a condition to his receiving the truck, but shortly thereafter it told plaintiff he could take the truck without such release, and that he might bring any action he desired to recover any damages he had sustained under the policy. Plaintiff offered evidence tending to show the value of the truck just prior to the time it was damaged by the fire, claiming that he was entitled to recover the value of the truck as of that time, and instructions on this theory were given by the court.

We think the theory of the plaintiff was entirely wrong as were the instructions. The policy provided that in case the automobile was damaged by fire the damages should "in no event exceed what it would then cost to repair or replace the automobile." If the suit is based on the policy, the terms just quoted fix the maximum which plaintiff could recover. There is no theory under the policy which would warrant plaintiff in recovering the value of the truck prior to the time it was damaged by fire. If the defendant wrongfully converted the truck to its own use, the conversion not having taken place until after the fire, it converted the damaged truck and not the truck as it was just prior to the fire.

It is difficult for us to understand the theory of plaintiff's case. As stated, the praecipe is in assumpsit and in the statement of claim plaintiff alleges the issuance of the insurance policy by the defendant to plaintiff covering the truck; that while the policy was in effect the truck was partially destroyed by fire; that immediately thereafter the defendant took possession of the truck and retained possession of it from that time; that plaintiff demanded the return of the truck "to him in the same condition it was prior to the fire," but that defendant

as stated, that all of the repairs had not been made. Evidence on behalf of the defendant was to the effect that at first it did demand a release in full from the plaintiff as a condition to his receiving the truck, but shortly thereafter it told plaintiff he could take the truck without such release, and that he might bring any action he desired to recover any damages he had sustained under the policy. Plaintiff offered evidence tending to show the value of the truck just prior to the time it was damaged by the fire, claiming that he was entitled to recover the value of the truck as of that time, and instructions on this theory were given by the court.

We think the theory of the plaintiff was entirely wrong as were the instructions. The policy provided that in case the automobile was damaged by fire the damages should "in no event exceed what it would then cost to repair or replace the automobile." If the suit is based on the policy, the facts just quoted fix the maximum which plaintiff could recover. There is no theory under the policy which would warrant plaintiff in recovering the value of the truck prior to the time it was damaged by fire. If the defendant wrongfully converted the truck to its own use, the conversion not having taken place until after the fire, it converted the damaged truck and not the truck as it was just prior to the fire. It is difficult for us to understand the theory of plaintiff's case. As stated, the doctrine is in themselves and in the statements of claim plaintiff alleges the issuance of the insurance policy by the defendant as plaintiff covering the truck; that while the policy was in effect the truck was partially destroyed by fire; that immediately thereafter the defendant took possession of the truck and retained possession of it from that time; that plaintiff demanded the return of the truck "to him in the same condition it was prior to the fire," and that defendant

"refused to do so." The statement of claim then alleges that the policy provides, "It shall be optional with this Company to take all or any part of the property at the appraised value where appraisal is had as hereinafter provided, but there can be no abandonment thereof to this Company." Plaintiff's damages were then laid at the sum of \$5,000. The statement of claim then alleges that plaintiff is in the general expressing and van business and was using the truck in his business and that he had suffered damage through the loss of his truck from the date of the fire.

The defendant filed an affidavit of merits which is also rather difficult to understand in view of the evidence in the case. In the affidavit the defendant denies that he refused to return the truck to plaintiff; avers that the truck was taken, by the consent of the parties, by the defendant to an automobile company engaged in making repairs, to have the damage repaired. It denies that plaintiff had made a sufficient or proper demand for the truck and further that plaintiff had failed and refused "to make tender of the indebtedness by reason of the aforesaid repairs at the time of the demand, if any was made." The allegations then are to the effect that the defendant denies that it converted the truck to its own use and neither admits nor denies that the truck was partially damaged by fire; avers that defendant took the truck with plaintiff's consent to have it repaired in accordance with the insurance policy; that the repairs were made in a workmanlike manner in accordance with the policy; neither admits nor denies that plaintiff was engaged in the expressing business or that the truck was used in that business.

Under the evidence in the record, we think it clear that plaintiff was not required, as a condition to receiving his truck to execute a release to the defendant of all claims under the policy if plaintiff was of the opinion that the repairs

"refused to do so." The statement of claim then alleges that the policy provides, "it shall be optional with this Company to take all or any part of the property at the appraised value where up- insured is had as hereinafter provided, but there can be no abandonment thereof to this Company." Plaintiff's damages were then laid at the sum of \$5,000. The statement of claim then alleges that plaintiff is in the general exercising and van business and was using the truck in his business and that he had suffered damage through the loss of his truck from the date of the fire.

The defendant filed an affidavit of merits which is also rather difficult to understand in view of the evidence in the case. In the affidavit the defendant denies that he refused to return the truck to plaintiff; avers that the truck was taken by the consent of the parties, by the defendant to an automobile company engaged in making repairs, to have the damage repaired. It denies that plaintiff had made a sufficient or proper demand for the truck and further that plaintiff had failed and refused to make tender of the indebtedness by reason of the alleged repairs then at the time of the demand, if any was made. The allegations then are to the effect that the defendant denies that it converted the truck to its own use and neither admits nor denies that the truck was partially damaged by fire; avers that defendant took the truck with plaintiff's consent to have it repaired in accordance with the insurance policy; that the repairs were made in a workmanlike manner in accordance with the policy; neither admits nor denies that plaintiff was engaged in the exercising business or that the truck was used in that business.

Under the evidence in the record, we think it clear that plaintiff was not required, as a condition to recovering his truck to execute a release to the defendant of all claims under the policy if plaintiff was of the opinion that the repairs

required by the policy had not been made. Of course, he could bring replevin and if he fails to recover the truck a count in trover could be added. But in view of the evidence on the trial we think it apparent that at the time of the trial the defendant was willing to deliver the truck without demanding any release; and there is also evidence in the record, among other things, consisting of letters written by the defendant to plaintiff and his counsel advising plaintiff to come and take the truck and no mention is made of any release.

In view of what we have said, it is obvious that the case was brought and tried on an incorrect theory. There is no theory in which the judgment can be affirmed.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

regulated by the policy had not been made. Of course, he could
bring repairs and if he fails to recover the truck a court in
favor could be asked. But in view of the evidence on the trial
we think it apparent that at the time of the trial the defendant
was willing to deliver the truck without demanding any release;
and there is also evidence in the record, among other things,
consisting of letters written by the defendant to plaintiff and
his counsel advising plaintiff to come and take the truck and
no mention is made of any release.

In view of what we have said, it is obvious that
the case was brought and tried on an incorrect theory. There is
no theory in which the judgment can be affirmed.
The judgment of the Municipal Court of Chicago is
reversed and the cause remanded.

REVEREND AND HONORABLE

MAJESTY, P. J., and HONORABLE, J. J. CONNOR.

34783

In Re: Estate of IMMAN E. VANDRY, Deceased,

CLARA FISHER,
Appellant,

vs.

BONNIE M. VANDRY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

260 I.A. 623⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The question for decision in this case is whether the deceased, Imman E. Vandry, was legally married to Bonnie M. Benton on April 4, 1923. There was a hearing on this question in the Probate court of Cook county, and a finding and judgment that there was such legal marriage, and on appeal to the Circuit court a similar finding and judgment was entered and this appeal follows.

The contest is between Clara Fisher, a sister of the deceased, and others on the one hand, and Bonnie M. Vandry, widow of the deceased, and others, as to who was to receive the \$40,000 estate left by the deceased. Clara Fisher will in this opinion be referred to as the petitioner, and Bonnie M. Vandry as the respondent.

The evidence of the respondent is to the effect that she and Imman E. Vandry, the deceased, were united in marriage April 4, 1923, at Fort Wayne, Indiana, by Jacob Ahnert, who was a regular, ordained minister of the United Brethren Church. On the other hand it is the contention of the petitioner that while the parties lived together as husband and wife, they were never married.

The evidence tends to show that for a number of years Imman E. Vandry was engaged in the business of putting on shows and entertainments in different States of the Union, traveling from one place to another; that during that time his home was in Chicago, and he became acquainted with Bonnie M. Benton, and shortly before April, 1923, Vandry told some of his friends and acquaintances

In Re: Estate of IRMAN H. VANDY, Deceased.

CLARA FISHER,
Appellant,

vs.

BONNIE M. VANDY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2201A.623

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The question for decision in this case is whether the deceased, IRMAN H. VANDY, was legally married to BONNIE M. HANTON on April 4, 1932. There was a hearing on this question in the Probate Court of Cook County, and a finding and judgment that there was such legal marriage, and on appeal to the Circuit Court a similar finding and judgment was entered and this appeal follows.

The contest is between Clara Fisher, a sister of the deceased, and others on the one hand, and BONNIE M. VANDY, widow of the deceased, and others, as to who was to receive the \$40,000 estate left by the deceased. Clara Fisher will in this opinion be referred to as the petitioner, and BONNIE M. VANDY as the respondent.

The evidence of the respondent is to the effect that she and IRMAN H. VANDY, the deceased, were united in marriage April 4, 1932, at Fort Wayne, Indiana, by Jacob ANGER, who was a regular ordained minister of the United Brethren Church. On the other hand it is the contention of the petitioner that while the parties lived together as husband and wife, they were never married.

The evidence tends to show that for a number of years IRMAN H. VANDY was engaged in the business of putting on shows and entertainments in different States of the Union, traveling from one place to another; that during that time his home was in Chicago, and he became acquainted with BONNIE M. HANTON, and shortly before April, 1932, VANDY told some of his friends and acquaintances

in Chicago that he and Miss Benton were going to be married; that on April 4th they went together from Chicago to Fort Wayne and on the evening of that day appeared at the home of the Reverend Ahner and requested that he unite them in marriage. Vandry produced a marriage license which the minister examined and then performed the marriage ceremony. That night Vandry and his wife registered at the Wayne hotel in Fort Wayne where they stayed that night, and for the next week or ten days they lived together at a boarding house in that city, and at the end of that time they returned together to Chicago where they continued to live as husband and wife at two different hotels and then occupied an apartment in Chicago; that on February 22, 1924, a baby boy, Inman E. Vandry, Jr., was born to the parties. They continued to live together as husband and wife until the late fall of 1925, when they separated on account of a disagreement as to whether the wife should stay at home and take care of the baby and household as the husband desired, or whether she should help earn money by selling real estate, as she desired to do. Thereafter they lived separate and apart in Chicago, the mother having the baby with her, until Vandry died April 29, 1928. Shortly after the funeral the estate was probated, and while it was being probated in the Probate court of Cook county this contest arose.

On behalf of the petitioner the evidence was to the effect that after the separation of the couple Vandry stated, at different times, that he and the respondent had never been married but that she was his common law wife. Mrs. Fisher, the petitioner, a sister of the deceased, testified that he at the time of his death was 41 years of age; that when he was young the family lived at Pittsburg, Kansas; that the deceased left home when he was about nineteen, from time to time returning to visit the family; that shortly after the funeral of the deceased she found a paper in a safety deposit box, which was kept by deceased and herself, at

in Chicago that he and Miss Denton were going to be married; that on April 14th they went together from Chicago to Fort Wayne and on the evening of that day appeared at the home of the Reverend Amner and requested that he unite them in matrimony. Vandy produced a marriage license which the minister examined and then performed the marriage ceremony. That night Vandy and his wife registered at the Wayne Hotel in Fort Wayne where they stayed that night, and for the next week or ten days they lived together at a boarding house in that city, and at the end of that time they returned together to Chicago where they continued to live as husband and wife at two different hotels and then occupied an apartment in Chicago; that on February 22, 1934, a baby boy, known as Vandy, Jr., was born to the parties. They continued to live together as husband and wife until the late fall of 1935, when they separated on account of a disagreement as to whether the wife should stay at home and take care of the baby and household as the husband desired, or whether she should help earn money by selling real estate, as she desired to do. Thereafter they lived separate and apart in Chicago, the mother having the baby with her, until Vandy died April 22, 1936. Shortly after the funeral the estate was probated, and while it was being probated in the Probate Court of Cook County said contest arose.

On behalf of the petitioner, the evidence was to the effect that after the separation of the couple Vandy stated, at different times, that he and the respondent had never been married but that she was his common law wife. Witness, the petitioner, a sister of the deceased, testified that he at the time of his death was 41 years of age; that when he was young the family lived at Pittsburg, Kansas; that the deceased left home when he was about nineteen, from time to time returning to visit the family; that shortly after the funeral of the deceased she found a paper in a safety deposit box, which was kept by deceased and herself, at

Pittsburg, Kansas; that the paper was in the handwriting of the deceased. The document is in evidence and is as follows:

"October 5, 1927. I have settled for the child paid Bonnie \$10,000 Sept 29, 1925 J. E. Vandry This paper is in my deposit box." There was a contrariety of opinion by handwriting experts as to whether the above document was in the handwriting of the deceased. Mrs. Fisher further testified that on September 25, 1925, when her brother was at home in Pittsburg, he told her he was not married; that the respondent was his common law wife and that she never knew that there was a baby born to the deceased and respondent until after the death of her brother.

John O'Donnell called by petitioner testified that he had been associated with the deceased in the show business for a number of years; that he knew him quite intimately; that about September, 1926, he had a talk with Vandry who told him he was having trouble with his wife and he was going to see an attorney; that Vandry said he and the respondent were not married but had made arrangements to live together without a legal ceremony.

Dalbert Simpson testified that he and Vandry belonged to the same Masonic lodge and at the request of Vandry he went to Vandry's home because Vandry and his wife were having trouble as to whether she should stay at home as he desired or go into the real estate business, as she wished to do; that he was introduced by Vandry to his wife and that after some discussion Vandry stated he would leave home unless his wife would stay at home and take care of the baby and household; that thereupon Mrs. Vandry put her hand on her husband's shoulder and said, "Thy, you must not do this, you cannot do this; he needs me, this is our love child;" that on a later occasion Vandry told him that he and the respondent had not been married. Petitioners also offered evidence to the effect that no marriage license had been issued at Fort Wayne, Indiana,

Pittsburg, Kansas; that the paper was in the handwriting of the deceased. The document is in evidence and is as follows:

"October 2, 1937. I have settled for the child paid homicide \$10,000 Sept 29, 1935. I. E. Vandy. This paper is in my deposit box." There was a contrary opinion of handwriting experts as to whether the above document was in the handwriting of the deceased. Mrs. Fisher further testified that on September 25, 1935, when her brother was at home in Pittsburg, he told her he was not married; that the respondent was his common law wife and that she never knew that there was a baby born to the deceased and respondent until after the death of her brother.

John O'Donnell called by petitioner testified that he had been associated with the deceased in the show business for a number of years; that he knew his wife intimately; that about September, 1934, he had a talk with Vandy who told him he was having trouble with his wife and he was going to see an attorney; that Vandy said he and the respondent were not married but had made arrangements to live together without a legal ceremony.

Delbert Simpson testified that he and Vandy belonged to the same Masonic Lodge and at the request of Vandy he went to Vandy's home because Vandy and his wife were having trouble as to whether she should stay at home or he desired to go into the real estate business, as she wished to do; that he was introduced by Vandy to his wife and that after some discussion Vandy stated he would leave home unless his wife would stay at home and take care of the baby and household; that conversation Mrs. Vandy put her hand on her husband's shoulder and said, "Why, you must not do this, you cannot do this; he needs me, this is our love child"; that on a later occasion Vandy told him that he and the respondent had not been married. Testimony also offered evidence to the effect that no marriage license had been issued at Fort Wayne, Indiana,

authorizing the marriage of the parties and that no license had been returned by the person officiating at the marriage, as the law of that State required. This is substantially all the evidence offered tending to show that the parties were not legally married.

On the other hand, the Reverend Ahner testified that he had been a minister of a church in Fort Wayne or in the nearby vicinity of that city for twenty-five years; that he had married about forty couples; that shortly before he performed the marriage ceremony in question he had retired from active duties as clergyman; that on the evening of April 4, 1923, the respondent and a man who said he was Inman E. Vandry called at his home, produced a marriage license and requested him to perform the marriage ceremony, which he did; that while it was the minister's duty to return the license to the clerk of the court at that time, he did not do so but gave it to Vandry with the request that Vandry return it to the clerk of the court, which Vandry agreed to do. The minister's testimony is corroborated by that of his wife. There is also documentary evidence showing that the Reverend Ahner had performed marriage ceremonies on a number of prior occasions.

The undisputed evidence is that on the evening of April 4, 1923, Vandry signed the hotel register, registering as I. E. Vandry and wife, as guests of the hotel, where they stayed that night as above stated. Counsel for petitioner conceded that the writing on the hotel register was the handwriting of Vandry. There is further evidence that the Vandrys stayed in Fort Wayne at a boarding house for about a week or ten days immediately thereafter, and then returned to Chicago.

Blake Smith and his wife testified that shortly before April 4th Vandry told them that he was to be married to the defendant and that shortly after the return of the parties from Fort Wayne Vandry telephoned Smith that he and the respondent had been married,

authorizing the marriage of the parties and that no license had been returned by the person officiating at the marriage, as the law of that state required. This is substantially all the evidence offered tending to show that the parties were not legally married.

On the other hand, the Reverend Amner testified that he had been a minister of a church in Port Wayne or in the vicinity of that city for twenty-five years; that he had married about forty couples; that shortly before he performed the marriage ceremony in question he had received from native ladies an offering that on the evening of April 4, 1932, the respondent and a man who said he was Isaac E. Vandy called at his home, produced a marriage license and requested him to perform the marriage ceremony, which he did; that while it was the minister's duty to return the license to the clerk of the court at that time, he did not do so but gave it to Vandy with the request that Vandy return it to the clerk of the court, which Vandy agreed to do. The minister's testimony is corroborated by that of his wife. There is also documentary evidence showing that the Reverend Amner had performed marriage ceremonies on a number of prior occasions.

The undisputed evidence is that on the evening of April 4, 1932, Vandy signed the hotel register, registering as I. E. Vandy and wife, as guests of the hotel, where they stayed that night as above stated. Counsel for defendant contended that the writing on the hotel register was the handwriting of Vandy. There is further evidence that the Vандыs stayed in Port Wayne at a boarding house for about a week or ten days immediately thereafter, and then returned to Chicago.

Birke Smith and his wife testified that shortly before April 4th Vandy told them that he was to be married to the defendant and that shortly after the return of the parties from Port Wayne Vandy telephoned Smith that he and the respondent had been married.

and thereafter Vandry and his wife frequently visited the Smiths at their home.

The undisputed evidence also shows that Vandry and his wife lived at the Kenmore hotel in Chicago, where he registered them as husband and wife. Other witnesses testified that they frequently met Vandry and his wife and that Vandry introduced the respondent as his wife on all occasions, and that Vandry also spoke a number of times about their baby. The evidence also shows that Vandry and his wife bought real estate, executed mortgages as husband and wife, and the deeds and documents in evidence show this to be the fact.

Dr. Clark testified that he attended Mrs. Vandry at the birth of the child; that he filled out the certificate of birth, receiving most of his information from Vandry, which was to the effect that the parties were regularly married, etc. There is other evidence in the record, all of which is to the effect that the parties lived together as husband and wife. She was also introduced as his wife, and there was never any suggestion that the parties were not lawfully married; they lived together at various hotels and apartments; they bought property and the deeds are of record; all of this took place before any trouble arose and all of the evidence leads us to but one conclusion - that the parties were lawfully married at Fort Wayne, Indiana, on April 4, 1923. The evidence to the contrary is very meager and unsatisfactory.

Upon a careful consideration of all the evidence in the record, we are clearly of the opinion that no judgment could stand in this case except the one finding the marriage valid; that the finding of the Probate and Circuit courts is the only finding warranted by the evidence. There was no legal reason why the parties could not be married in any state of the Union, so that it is obvious that sec. 1, par. 20, chap. 39, Cahill's 1929 statutes,

and thereafter Vandy and his wife frequently visited the Station at their home.

The undisputed evidence also shows that Vandy and his wife lived at the Kenmore Hotel in Chicago, where he registered them as husband and wife. Other witnesses testified that they frequently met Vandy and his wife and that Vandy introduced the respondent as his wife on all occasions, and that Vandy also spoke a number of times about their baby. The evidence also shows that Vandy and his wife bought real estate, executed mortgages as husband and wife, and the deeds and documents in evidence show this to be the fact.

Dr. Clark testified that he attended Mrs. Vandy at the birth of the child; that he filled out the certificate of birth, receiving most of his information from Vandy, which was to the effect that the parties were regularly married, etc. There is other evidence in the record, all of which is to the effect that the parties lived together as husband and wife. This was also introduced as his wife, and there was never any suggestion that the parties were not lawfully married; they lived together at various hotels and apartments; they bought property and the deeds are of record; all of this took place before any trouble arose and all of the evidence leads us to get one conclusion - that the parties were lawfully married at Fort Wayne, Indiana, on April 4, 1922. The evidence in the country is very meager and unsatisfactory.

Upon a careful consideration of all the evidence in the record, we are clearly of the opinion that no judgment could stand in this case except one and that the marriage was valid; that the finding of the Probate and Circuit courts is the only finding warranted by the evidence. There was no legal reason why the parties could not be married in any state of the Union, so that it is obvious that sec. 1, par. 20, chap. 38, Smith's 1920 statutes,

to which counsel for the petitioner refers, is in no way applicable here. It provides that any person residing in this State and intending to so reside, "and who is disabled or prohibited from contracting marriage under the laws of this State," and shall go into another State and there contract a marriage prohibited by the laws of this State, that such marriage shall be null and void. The parties here were not prohibited by the laws of this State from getting married in this State.

Counsel for petitioner make a number of contentions that the court erred in the admission and exclusion of evidence - (1) that there was no evidence that the deceased was a party to the ceremony at Fort Wayne. We think this is unsound. It is undisputed that Inman E. Vandry and the respondent were in Fort Wayne on April 4, 1923. His genuine signature appears in the hotel register; it would be strange if the respondent had married some other man at that time and place and that immediately thereafter she returned to Chicago and lived with the deceased. Obviously the contention is wholly unwarranted. (2) A further contention is that the testimony of the minister and his wife concerning the marriage license was inadmissible. Their testimony was that Vandry produced a marriage license, which they described, and the minister testified that he read it. It is equally clear that this evidence was entirely competent. (3) That the statement made by the respondent to Harvey E. Wynekoop "to the effect that she had been married in Michigan," was not a privileged communication and should have been admitted. The respondent called Wynekoop an attorney at law. He testified that the respondent called at his office one day and consulted him as a lawyer; that she did not pay him any fee and that he did not ask her for any. Counsel then offered to show by the witness that Mrs. Vandry had consulted him with reference to filing a bill for separate maintenance against her husband, the deceased, and he talked

to which counsel for the petitioner refers, is in no way applicable here. It provides that any person residing in this State and intending to so reside, "and who is divorced or prohibited from contracting marriage under the laws of this State," and shall be liable another State and there contracted a marriage prohibited by the laws of this State, that such marriage shall be null and void. The parties have were not prohibited by the laws of this State from getting married in this State.

Counsel for petitioner make a number of contentions - that the court erred in the admission and exclusion of evidence - (1) that there was no evidence that the deceased was a party to the ceremony at Fort Wayne. We think this is absurd. It is undisputed that Lillian W. Vandy and the respondent were in Fort Wayne on April 4, 1923. His genuine signature appears in the hotel register; it would be strange if the respondent had married some other man at that time and place and that immediately thereafter she returned to Chicago and lived with the deceased. Obviously the contention is wholly unwarranted. (2) A further contention is that the testimony of the minister and his wife concerning the marriage license was inadmissible. Their testimony was that Vandy produced a marriage license, which they described, and the minister testified that he read it. It is equally clear that this evidence was entirely competent. (3) That the statement made by the respondent to Harvey E. Wynekoop "to the effect that she had been married in Michigan," was not a privileged communication and should have been admitted. The respondent called Wynekoop an attorney at law. He testified that the respondent called at his office one day and consulted him as a lawyer; that she did not pay him any fee and that he did not ask her for any. Counsel then offered to show by the witness that Wynekoop had consulted him with reference to filing a bill for recovery of maintenance against her husband, she deceased, and he talked

with her about that matter; that after this he wrote the husband a letter advising him that the wife had called and what she desired and endeavored to ascertain from the husband whether he would support the wife and child without court action; that a day or so after this Vandry called him on the telephone and, among other things, stated that he and the respondent had never been married but had been living together; that a few days later Mrs. Vandry again came to the office and he told her what the husband had said; that thereupon the wife stated that she and Vandry had been married at a town in the state of Michigan, mentioning the name of a town, and that after this conversation Wynekoop told Mrs. Vandry he could not proceed with the separate maintenance case. We think it obvious that this was a privileged communication. It was concerning a matter in which Mrs. Vandry had called to obtain Wynekoop's legal advice; but even if the evidence had been admitted, we think it would tend to support the respondent's side of the case rather than the petitioner's. It is to the effect that she informed Wynekoop that the parties had been married, giving the name of a Michigan town where the marriage was performed, and after receiving this information it seems somewhat strange that the attorney refused to take the case. The only evidence he had to the contrary was the telephone call from Vandry. (4) A further contention is that since the respondent bases her case on the fact that there had been a legal marriage ceremony performed, it was not competent to show by witnesses that the parties thereafter lived together as husband and wife and so conducted themselves openly by referring to each other as husband and wife. We think this contention is unsound. This evidence was competent as tending to corroborate the fact that a marriage ceremony had been performed in Fort Wayne. Moreover, the petitioner offered evidence to the effect that Vandry had stated to different persons that he and the respondent were not married. If

with her about that matter; that after this he wrote the husband a letter advising him that the wife had called and what she desired and endeavored to ascertain from the husband whether he would support the wife and child without court action; that a day or so after this Vandy called him on the telephone and, among other things, stated that he and the respondent had never been married but had been living together; that a few days later Mrs. Vandy again came to the office and he told her what the husband had said; that thereupon the wife stated that she and Vandy had been married at a town in the state of Michigan, mentioning the name of a town, and that after this conversation Wynkoop told Mrs. Vandy he could not proceed with the separate maintenance case. He thinks it obvious that this was a privileged communication. It was concerning a matter in which Mrs. Vandy had called to obtain Wynkoop's legal advice; but even if the evidence had been admitted, we think it would tend to support the respondent's side of the case rather than the petitioner's. It is to the effect that she informed Wynkoop that the parties had been married, giving the name of a Michigan town where the marriage was solemnized, and after receiving this information it seems somewhat strange that the attorney refused to take the case. The only evidence he had to the contrary was the telephone call from Vandy. (4) A further contention is that since the respondent does not care on the fact that there had been a legal marriage ceremony performed, it was not competent to show by witnesses that the parties thereafter lived together as husband and wife and so conducted themselves openly by referring to each other as husband and wife. We think this contention is unavailing. This evidence was competent as tending to corroborate the fact that a marriage ceremony had been performed in West Bayne. Moreover, the petitioner offered evidence to the effect that Vandy had acted to different persons that he and the respondent were not married. It

this evidence was competent, and there is no contention to the contrary, we think it clear that the evidence as to contrary conduct and statements of the parties was equally competent.

A great many other contentions are made by the petitioners all of which we have considered. It would serve no useful purpose to refer to them here because, as stated, we are clearly of the opinion that the judgment in this case is right, and therefore it is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

This evidence was competent, and there is no complaint to the con-
 trary, we think it clear that the evidence as to contrary conduct
 and statements of the parties was equally competent.
 A great many other conclusions are made by the tri-
 bunal all of which we have considered. It would serve no useful
 purpose to refer to them here. As stated, we are clearly
 of the opinion that the judgment in this case is right, and there-
 fore it is affirmed.

AFFIRMED.

Attest, P. J. and Secretary, J. J.

34816

PEOPLE OF STATE OF ILLINOIS,
Defendant in Error,

vs.

PETER DELNERO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 624

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal court of Chicago charging the defendant with unlawfully carrying a loaded revolver concealed on his person. When the case was called for trial defendant demanded a jury trial, but the demand was ignored and the court proceeded to hear the witnesses, found the defendant guilty and imposed a fine of \$300 and one year in the House of Correction.

When the case was called for trial his counsel stated: "In this case, if the Court please, the defendant desires a jury trial. THE COURT: What is the charge? THE CLERK: Carrying a gun. THE COURT: What is your business? THE DEFENDANT I work in a meat market. THE COURT: Whom do you work for? A. Barcelona & Bazonis. THE COURT: What is your name? A. Peter Delnero. THE COURT: All right, I am not going to waste any time on a jury. Swear the witness. PETER DELNERO: I want a jury trial. MR. WOLF (defendant's counsel): He wants a jury. He still persists. THE COURT: All right, swear the witnesses. You may go to the Appellate court." The defendant was then arraigned and plead not guilty.

It is obvious that the court was without jurisdiction to try the cause because the defendant under the constitution of this State was entitled to a trial by jury unless he expressly waived such a trial. Sec. 5 and sec. 9, article 2 of the Constitution of 1870; People v. Fisher, 340 Ill. 250; People v. Ryan,

EXHIBIT OF STATE OF ILLINOIS,
Defendant in Error.

vs.

ETERN DELINNO,
Plaintiff in Error.

KNOW ALL MEN BY THESE PRESENTS,

THAT I, JUDGE OF THE CIRCUIT COURT

IN AND FOR THE COUNTY OF COOK,
DO hereby certify that the within and foregoing

is a true and correct copy of the original of the same as the same appears from the records of the court.

An information was filed in the Municipal Court of

Chicago charging the defendant with unlawfully carrying a loaded

revolver concealed on his person. When the case was called for

trial defendant demanded a jury trial, but the demand was ignored

and the court proceeded to hear the witnesses, found the defendant

guilty and imposed a fine of \$500 and one year in the House of

Correction.

When the case was called for trial his counsel stated:

"In this case, if the Court please, the defendant desires a jury

trial. THE COURT: What is the charge? THE DEFENDANT: Carrying a

gun. THE COURT: What is your business? THE DEFENDANT: I work

in a meat market. THE COURT: When do you work? A. Between

8 o'clock. THE COURT: What is your name? A. Peter Delinno.

THE COURT: All right, I am not going to waste any time on a jury.

Swear the witness. ETHER DELINNO: I want a jury trial. MR.

WOLF (defendant's counsel): He wants a jury. He still persists.

THE COURT: All right, swear the witness. You say no to the

Appellate Court." The defendant was then arraigned and pled not

guilty.

It is obvious that the court was without jurisdiction

to try the cause because the defendant under the constitution of

this State was entitled to a trial by jury unless he expressly

waived such a trial. See. 5 and sec. 2, article 3 of the Constitu-

tion of 1870: People v. Walker, 340 Ill. 280; People v. Rymer.

259 Ill. App. 536. In the instant case he not only did not waive a jury trial but demanded trial by jury, which the court ignored and denied.

By section 5, article 2 of the Constitution of 1870, "The right of trial by jury as heretofore enjoyed, shall remain inviolate." And section 9 of the same article provides that "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury." The provisions of the constitution are plain and unambiguous. They provide that a defendant charged with a crime is entitled to a trial by an impartial jury. But it has been held that this right may be expressly waived by the defendant. People v. Fisher, supra; People v. Ryan, supra. In the brief filed by the State's attorney on behalf of the People he says: "We can not deny that defendant was deprived of his constitutional right to a jury trial, and if the plaintiff in error has brought the record to the proper tribunal the error is fatal to the judgment," but contends that because a constitutional question is involved the appeal should go direct to the Supreme court. There is no merit in the contention. Where a defendant is convicted of a misdemeanor the appeal is to this court. Section 118 of the Practice act; People v. Forsyth, 339 Ill. 381. It is not every case in which the constitution is involved that goes direct to the Supreme court, but to warrant a case such as this to go direct to the Supreme court a constitutional question must exist, the question must be presented to the trial court, and it must be fairly debatable. People v. Forsyth, supra; Penn. Tank Line v. Jordan, 341 Ill. 94. The language of the constitution is plain and its meaning is not

250 Ill. App. 576. In the instant case he not only did not waive a jury trial but demanded trial by jury, which the court ignored and denied.

By section 5, article 2 of the Constitution of 1870,

"The right of trial by jury as heretofore enjoyed, shall remain

inviolate." And section 9 of the same article provides that

"In all criminal prosecutions the accused shall have the right

to appear and defend in person and by counsel, to demand the nature

and cause of the accusation and to have a copy thereof, to meet

the witnesses face to face, and to have process to compel the at-

tendance of witnesses in his behalf, and a speedy public trial by

an impartial jury." The provisions of the constitution are plain

and unambiguous. They provide that a defendant charged with a

crime is entitled to a trial by an impartial jury. But it has

been held that this right may be expressly waived by the defendant.

People v. Fisher, supra; People v. Ryan, supra. In the first cited

by the State's attorney on behalf of the People he says: "We can

not deny that defendant was deprived of his constitutional right to

a jury trial, and if the plaintiff in error has brought the record

to the proper tribunal the error is fatal to the judgment," but

contends that because a constitutional question is involved the

appeal should be direct to the Supreme court. There is no merit

in the contention. Where a defendant is convicted of a misdemeanor

the appeal is to this court. Section 115 of the Practice act;

People v. Foxworth, 250 Ill. 281. It is not every case in which the

constitution is involved that goes direct to the Supreme court, but

to warrant a case such as this to go direct to the Supreme court

a constitutional question must exist, the question must be pre-

sented to the trial court, and it must be fairly deductible. People

v. Foxworth, supra; People v. Jordan, 251 Ill. 94. The

language of the constitution is plain and its meaning is not

debatable. The charge in the instant case being a misdemeanor is reviewable by this court. The court being without authority to hear the case, the judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

debatable. The charge in the instant case being a misdemeanor is reviewable by this court. The court being without authority to hear the case, the judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVEREND AND RESPECTED.

WATSON, J. J., and WATSON, J. J., concur.

34354

AVAILABLE TRUCK COMPANY,
a Corporation,

(Plaintiff) Plaintiff
in Error,

v.

EUREKA MOTOR SERVICE COMPANY,
a Corporation,

(Defendant) Defendant
in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

260 I.A. 624

Opinion filed March 14, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff in error Available Truck Company, a corporation, filed its declaration in the Circuit Court of Cook County at the February Term 1929. The declaration consisted of the common counts, together with an affidavit of the amount due. Defendant Eureka Motor Service Company, a corporation, filed its plea of the general issue. March 14, 1929, on motion of counsel for defendant, plaintiff was ordered to file a bill of particulars, which was duly filed May 29, 1929. June 5, 1929, defendant filed what is entitled a plea to the bill of particulars of the plaintiff, in which the defendant denied ever having entered into any contract, either verbal or written, with the plaintiff; denied that it contracted with the plaintiff, by which contract the plaintiff was to build a mechanical power stone hoist and denied that the defendant promised to pay for same in the manner as charged in the declaration and bill of particulars thereafter filed. This so-called plea to the bill of particulars was sworn to by one Robert J. Toneman. Nothing further was done in the cause until it was called for trial April 15, 1930, at which time counsel for plaintiff moved to strike from the files the so-called plea to the bill of particulars on the ground

24384

AVAILABLE TRUCK COMPANY,
a corporation,
(Plaintiff) vs.
in error,

EMEREX MOTOR SERVICE COMPANY,
a corporation,
(Defendant) vs.
in error.

(Defendant) vs.
in error.

Opinion filed March 11, 1931

MR. PRESIDENT: JUSTICE WILSON delivered the opinion of

the court.

Plaintiff in error available truck company, a corporation,
filed its declaration in the circuit court of Cook County at the
February term 1929. The declaration consisted of the common counts,
together with an affidavit of the amount due. Defendant answer
Motor Service Company, a corporation, filed its plea of the general
issue. March 14, 1929, on motion of counsel for defendant, plaintiff
was ordered to file a bill of particulars, which was duly
filed May 28, 1929. June 2, 1929, defendant filed what is entitled
a plea to the bill of particulars of the plaintiff, in which she
defendant denied ever having entered into any contract, either
verbal or written, with the plaintiff; stated that it contemplated
with the plaintiff, by which contract the plaintiff was to build
a mechanical power stone boat and denied that the defendant promised
to pay for work in the manner as charged in the declaration and
bill of particulars thereafter filed. This so-called plea to the
bill of particulars was sworn to by one Robert J. Townsend. Nothing
further was done in the cause until it was called for trial April 15,
1930, at which time counsel for plaintiff moved to strike from the
file the so-called plea to the bill of particulars on the ground

that there was no such pleading known to law and that the affidavit of merits thereto was signed by the said Toneman in his own behalf and not as an agent of the defendant. The affidavit in question was signed by Toneman, as president, but is entitled in his name and not in the name of the defendant company. Counsel for defendant insisted upon a trial and moved that he be given leave to file an amended affidavit during the course of the proceedings.

The instrument entitled, "plea" to the bill of particulars was, in fact, a statement of defense to the declaration and, among its concluding allegations, contained the following:

"And this defendant further says that it did not promise in manner and form as the plaintiff has above thereof complained against it in its declaration and bill of particulars thereafter filed therein; and of this the defendant puts itself upon the country, etc."

The title to a pleading of this character is not necessarily controlling, but what it is, and what its purpose is, may be gathered from its entire context. Plaintiff was fully advised, by the defense set up in this document, as to what it would be compelled to meet upon the trial of the cause and could not claim surprise. If counsel for plaintiff had been desirous of settling the pleadings, it should have been done before the cause was reached for trial. A motion to strike the amendment and the so-called plea to the bill of particulars, should have been made in writing before the cause was reached for trial and, this not having been done, it was discretionary with the trial court as to whether the cause should proceed. The filing of an amended affidavit to this statement of defense of the defendant was discretionary with the court and was properly allowable, as it was fully stated when the cause was reached for trial that its purpose was to furnish a sufficient affidavit and not to change the theory of defense.

Gottschalk v. Village of Posen, 252 Ill. App. 352; Bell v. Toluca Coal Co. 272 Ill. 576.

that there was no such pleading known to law and that the affidavit of service thereto was signed by the said Tennessen in his own behalf and not as an agent of the defendant. The affidavit in question was signed by Tennessen, as president, but is entitled in his name and not in the name of the defendant company. Counsel for defendant insisted upon a trial and moved that he be given leave to file an amended affidavit during the course of the proceedings. The instrument entitled, "also" to the bill of particulars was, in fact, a statement of defense to the declaration and among its concluding allegations, contained the following:

"And this defendant further says that it did not promise in manner and form as the plaintiff has above thereof claimed against it in its declaration and bill of particulars; that it filed therein; and of it is the defendant puts itself upon the country, etc."

The title to a pleading of this character is not necessarily controlling, but what it is, and what its purpose is, may be gathered from its entire context. If it is truly a bill of particulars, as to what it would be compelled to set upon the trial of the cause and could not claim otherwise. If counsel for plaintiff had been desirous of settling the pleadings, it should have been done before the cause was reached for trial. A motion to strike the amendment and the so-called bill to the bill of particulars, should have been made in writing before the cause was reached for trial and, this not having been done, it was discretionary with the trial court as to whether the cause should proceed. The filing of an amended affidavit to this statement of defense of the defendant was discretionary with the court and was properly allowed, as it was fully stated when the cause was reached for trial that its purpose was to furnish a sufficient affidavit and not to change the theory of defense.

Counsel for plaintiff being unwilling to proceed with the trial on the conditions allowed by the court, it was proper that a non-suit should be entered as was done in this cause.

Delano v. Bennett, 61 Ill. 83.

The right to permit amendments is discretionary with the court at any time, provided the interests of the parties are not jeopardized. The court ordered the parties to proceed with the cause. Counsel for plaintiff declined to do so and the suit was dismissed for want of prosecution. We find no error in the action of the trial court or the orders entered.

The order of the Circuit Court in dismissing the suit for want of prosecution is affirmed.

ORDER AFFIRMED.

HEBEL AND FRIEND, J.J. CONCUR.

Counsel for plaintiff being unwilling to proceed with the trial on the conditions allowed by the court, it was proper that a non-suit should be entered as was done in this case.

Deane v. Bennett, 61 Ill. 52.

The right to permit amendments is discretionary with the court at any time, provided the interests of the parties are not jeopardized. The court ordered the parties to proceed with the case. Counsel for plaintiff declined to do so and the suit was dismissed for want of prosecution. No finding was entered in the action of the trial court or the orders entered.

The order of the circuit court in dismissing the suit for want of prosecution is affirmed.

ORDER AFFIRMED.

WHEEL AND WHEEL, J. L. DODGE.

34466

HELEN B. SMITH,

Plaintiff-Appellee,

v.

W. E. MCCARRON CORPORATION,
(a corporation)

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

260 I.A. 624³

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff Helen B. Smith brought her action in tort against the defendant W. E. McCarron Corporation to recover for personal injuries received by her and damages to her automobile, by reason of a collision with a truck which was being operated by one of the defendant's servants. The trial resulted in a verdict for \$2,000 in favor of the plaintiff and upon this verdict judgment was entered and an appeal prayed and allowed to this court.

Plaintiff's declaration consisted of five counts, of which the second, third and fifth counts were dismissed on motion of counsel for the plaintiff, and the suit continued as to the first and fourth. The first count is based upon injury to the person of the plaintiff and the fourth count charges damages to the automobile. Defendant filed pleas of the general issue and a special plea denying ownership or control of the truck.

Among the various errors assigned are: that the verdict is not supported by the evidence; that the evidence does not show that the automobile truck was being operated by the defendant; that the verdict of \$2,000 can not be sustained

34468

HELEN B. SMITH,

Plaintiff-Appellee,

v.

W. E. MCCARTON CORPORATION,
(a corporation)

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

JOSE COUNTY.

2001 A. 324

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion

of the court.

The plaintiff Helen B. Smith brought her action in

damages against the defendant W. E. McCarton Corporation to

recover for personal injuries received by her and damages to

her automobile, by reason of a collision with a truck which

was being operated by one of the defendant's servants. The

trial resulted in a verdict for \$2,000 in favor of the plain-

tiff and upon this verdict judgment was entered and an appeal

prayed and allowed to this court.

Plaintiff's declaration consisted of five counts,

of which the second, third and fifth counts were dismissed on

motion of counsel for the plaintiff, and the suit continued as

to the first and fourth. The first count is based upon injury

to the person of the plaintiff and the fourth count charges

damages to the automobile. Defendant filed pleas of the general

issue and a special plea denying ownership or control of the

truck.

Among the various errors assigned here is that the

verdict is not supported by the evidence; that the evidence

does not show that the automobile truck was being operated by

the defendant; that the verdict of \$2,000 can not be sustained

by the averment of plaintiff's fourth count; and that the court improperly admitted evidence as to the earnings of the plaintiff and improperly instructed the jury that it had a right to consider her loss of earnings as an element of damage.

Examination of the facts shows that there was sufficient evidence in our opinion to justify the court in submitting the cause to the jury. It is also insisted that the verdict of \$2,000 can not be sustained under the fourth count which charges damages to the automobile, because the amount of damages awarded was in excess of the amount claimed under that particular count. With this we cannot agree. The plaintiff had the right to recover in the same action, both for damages to her person and to her automobile. The charges could have been made in one count and the damages set out therein, or she could have set forth the damages to her person and to her automobile in separate counts, and the jury had the right to include the total amount of damages in a single verdict.

Chicago West Division Ry. Co. v. Ingraham, 131 Ill. 659.

There was in the record sufficient evidence to justify the jury in finding that the truck which collided with the automobile of the plaintiff was, at the time, the property of and under the control of the defendant. On the trial of the cause the court, over the objection of counsel for the defendant, permitted the plaintiff to testify as to her income and what she earned by way of commissions and her inability to work and carry on her business. On the question of damages, the court instructed the jury that, in arriving at the amount of the damage sustained by the plaintiff, they had the right to take into consideration her loss of time and inability to work, if any, on account of such injuries.

by the averment of Plaintiff's fourth count; and that the court improperly admitted evidence as to the earnings of the Plaintiff and improperly instructed the jury that it had a right to consider her loss of earnings as an element of damage. Examination of the facts shows that there was

sufficient evidence in our opinion to justify the court in submitting the issue to the jury. It is also insisted that the verdict of \$3,000 can not be sustained under the fourth count which charges damages to the automobile, because the amount of damages awarded was in excess of the amount claimed under that particular count. With this we cannot agree. The Plaintiff had the right to recover in the same action, both for damages to her person and to her automobile. The charges could have been made in one count and the damages set out therein, or she could have set forth the damages to her person and to her automobile in separate counts, and the jury had the right to include the total amount of damages in a single verdict.

Chicago West Division Ry. Co. v. Lawrence, 151 Ill. 633.

There was in the record sufficient evidence to justify the jury in finding that the truck which collided with the automobile of the Plaintiff was, at the time, the property of and under the control of the defendant. On the trial of the case the court, over the objection of counsel for the defendant, permitted the Plaintiff to testify as to her income and that she earned by way of commissions and her inability to work and carry on her business. On the question of damages, the court instructed the jury that, in arriving at the amount of the damage sustained by the Plaintiff, they had the right to take into consideration her loss of time and inability to work, if any, on account of such injuries.

The first count of the declaration, upon which plaintiff's right to recover for personal injuries was based, contains no averment as to any financial loss by reason of her inability to work and earn money by reason of her having been incapacitated and laid up after the accident. The only charge appears to be that she was lame and disabled because of the accident and that she spent certain sums of money in attempting to be cured. The admission of evidence as to her loss of earnings was error as no claim was made in the declaration for such loss. For the same reason the instruction was erroneous. Walker v. Backus, 246 Ill. App. 382.

For the reasons stated, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

HEBEL AND FRIEND, JJ. CONCUR.

The first count of the declaration, upon which plain-
tiff's right to recover for personal injuries was based, con-
tains no averment as to any financial loss by reason of her
inability to work and earn money by reason of her having been
injured and laid up after the accident. The only charge
appears to be that she was lame and disabled because of the
accident and that she spent certain sums of money in attempting
to be cured. The admission of evidence as to her loss of
earnings was error as no claim was made in the declaration for
such loss. For the same reason the instruction was erroneous.
Walker v. Beckman, 246 Ill. App. 382.

For the reasons stated, the judgment of the Superior
Court is reversed and the cause remanded for a new trial.

REVEREND JUSTICE
JAMES M. HARRIS

REVEREND JUSTICE, J. J. CONNOR.

34473

RICHARD G. KEIZER,

Defendant in Error,

v.

RIVERSIDE BUILDING CORPORATION,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT.

COOK COUNTY.

260 I.A. 624⁴

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment by confession for \$5,269.50. The note was signed by the Riverside Building Corporation by Carroll L. Bragg, President, and John W. Hughes, Secretary, and was secured by a trust deed on real estate. On the face of the note appears the notation: "This note is secured by a junior mortgage". This notation is required by the Securities Act, Cahill's Illinois Revised Statutes, 1929, Chap. 32, Par. 257, Sec. 4, (7). It appears to have been stamped on the note lengthwise over the confession clause. It is insisted as a ground for reversal that this amounts to a cancellation of this particular clause and it is also urged that the attorney confessing judgment was associated with the office of the attorneys representing the plaintiff and that, by reason of this association, the attorney was without power to confess the judgment. We see no force in either of these arguments. The purpose of the notation, "This note is secured by a junior mortgage", is to furnish a compliance with the statute, and it is evident that it was not intended for the double purpose of such compliance and also of cancelling the confession clause. The legend on the note is in red ink and the confession clause in black letters and figures. The

RICHARD O. ELLER

Defendant in Error,

v.

RIVERSIDE BUILDING CORPORATION,

Plaintiff in Error.

SHOWN TO

SUBJECT MATTER

BOOK COUNTY.

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of

the court.

This is an appeal from a judgment by confession for \$2,300.50. The note was signed by the Riverside Building Corporation by Garvill L. Stagg, President, and John A. Hughes, Secretary, and was secured by a trust deed on real estate. On the face of the note appears the notation: "This note is secured by a Junior mortgage". This notation is required by the Securities Act, Garvill's Illinois Revised Statutes, 1929, Chap. 35, Art. 1267, Sec. 4, (7). It appears to have been stamped on the note lengthwise over the confession clause. It is inserted as a ground for reversal that this amounts to a cancellation of this particular clause and it is also urged that the attorney confessing judgment was associated with the office of the attorneys representing the plaintiff and that, by reason of this association, the attorney was without power to confer the judgment. We see no force in either of these arguments. The purpose of the notation, "This note is secured by a Junior mortgage", is to furnish a compliance with the statute, and it is evident that it was not intended for the double purpose of such compliance and also of cancelling the confession clause. The legend on the note is in red ink and the confession clause in black letters and figures. The

confession clause is easily distinguishable and readable under the stamped requirement.

Counsel for defendant cites the case of Village of Dolton v. Dolton Estate, 331 Ill. 88, in support of his position that the attorney was not properly qualified to confess the judgment. We fail to see wherein this case is in point. On the other hand, the opinion in that case expressly excepts confessions of judgment under a warrant of attorney, as in the case at bar. The note itself expressly provided that any attorney might confess the judgment and the maker expressly waived any errors by reason of said confession. Long v. Coffman, 230 Ill. App. 528.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

NEBEL AND FRIEND, JJ. CONCUR.

confession clause is easily distinguishable and readable under the stamped requirements.

Counsel for defendant cites the case of Village of

Gorton v. Gorton, 331 Ill. 28, in support of his position

that the attorney was not properly entitled to confess the judgment. We fail to see wherein this case is in point. On the other hand, the opinion in that case expressly expresses confessions of judgment under a warrant of attorney, as in the case at bar.

The note itself expressly provided that any attorney might confess the judgment and the maker expressly waived any errors by reason of said confession. Gorton v. Gorton, 331 Ill. 28, 332. For the reasons stated in this opinion the judgment

of the Superior Court is affirmed.

ATTORNEY GENERAL.

HAROLD AND WILSON, JR. COUNSEL.

34474

RICHARD G. KEIZER,

Defendant in Error,

v.

RIVERSIDE BUILDING CORPORATION,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

260 I.A. 625

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This is an appeal from a judgment on a promissory note for \$7,838.53. This cause was consolidated and considered with case No. 34473 in this court. The parties are the same and the facts are substantially similar. The judgment was originally entered for \$8,314.00, which included an attorney's fee. On motion this was corrected and reduced and the attorney's fee eliminated as there was no claim for it in the ad damnum to the declaration. The court properly corrected the judgment when it was called to its attention.

For the reasons stated in the opinion in case No. 34473, the judgment of the Superior Court in this case is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

RICHARD G. KEENE,

Defendant in error,

v.

RIVERSIDE BUILDING CORPORATION,

Plaintiff in error.

ERROR TO

SUPERIOR COURT,

COOS COUNTY,

2001 A. 625

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE NIXON delivered the opinion

of the court.

This is an appeal from a judgment on a promissory note for \$7,820.82. This cause was consolidated and considered with case No. 24473 in this court. The parties are the same and the facts are substantially similar. The judgment was originally entered for \$8,214.50, which included an attorney's fee. On motion this was corrected and reduced and the attorney's fee eliminated as there was no claim for it in the affidavit to the declaration. The court properly corrected the judgment when it was called to its attention.

For the reasons stated in the opinion in case No.

24473, the judgment of the Superior Court in this case is

affirmed.

JUDGMENT AFFIRMED.

KEENE AND KEENE, JJ. CONCUR.

34487

MARCELLUS HAMILTON,

Appellee,

v.

THEOLA HAMILTON,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

260 I.A. 625

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Complainant Marcellus Hamilton filed his bill in the Superior Court, praying for divorce from his wife, Theola Hamilton. To this bill Theola Hamilton filed her answer and also a cross-bill for separate maintenance. December 16, 1929, a default was taken against him and a decree entered finding the issues in favor of Theola Hamilton, the defendant and cross-complainant in said proceeding, and granting her a decree of separate maintenance. A provision was made in said decree for alimony for her support. No appeal was taken from this decree. The cross-complainant filed her petition in said cause asking for a rule on the complainant Marcellus Hamilton to show cause why he should not be adjudged in contempt for failure to pay alimony due under the decree. The complainant filed his motion and petition to vacate the said decree January 31, 1930, and the cause came on for hearing on the petition to show cause and the petition filed to vacate the decree. February 14, 1930, an order was entered by the chancellor of the Superior Court vacating said decree and on March 5, 1930, a motion was duly made on behalf of the cross-complainant asking that said order vacating said decree be expunged from the record.

We have before us nothing but the common law record and order of the court. This, however, shows first, a decree entered at the December Term, 1929, and second, the order of

THEODORA HAMILTON

Appellee,

v.

THEODORA HAMILTON

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOS COUNTY.

2001-11-625

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of

the court.

Complainant Theodora Hamilton filed her bill in the Superior Court, praying for divorce from her wife, Theodora Hamilton. To this bill Theodora Hamilton filed her answer and also a cross-bill for separate maintenance. December 18, 1929, a default was taken against her and a decree entered finding the issues in favor of Theodora Hamilton, the defendant and cross-complainant in said proceeding, and granting her a decree of separate maintenance. A provision was made in said decree for alimony for her support. No appeal was taken from this decree. The cross-complainant filed her petition in said court asking for a rule on the complainant Theodora Hamilton to show cause why she should not be adjudged in contempt for failure to pay alimony due under the decree. The complainant filed his motion and petition to vacate the said decree January 11, 1930, and the cause came on for hearing on the petition to show cause and the petition filed to vacate the decree. February 14, 1930, an order was entered by the chancellor of the Superior Court vacating said decree and on March 2, 1930, a motion was duly made on behalf of the cross-complainant asking that said order vacating said decree be expunged from the record. We have before us nothing but the common law record and order of the court. This, however, shows that a decree entered at the December term, 1929, and second, the order of

April 1, 1930, vacating said decree. The appeal is from this order and on the face of the record it is apparent that the order vacating the decree was entered after the term and after the court had lost jurisdiction to vacate the decree.

The appeal to this court is based apparently upon the motion to expunge the order vacating the decree from the record, but the effect of the appeal is to bring the entire order before this court for consideration. The recitals of the court in the decree must be taken as true and they show that a decree had been duly entered and after complainant had been defaulted.

It appears from the order that the court on April 1st, vacated the decree and thus it did not have the power to do. It is insisted on behalf of counsel for the complainant Marcellus Hamilton, that the court had jurisdiction at any time after the entry of its decree to change, alter or modify the provision in regard to the payment of alimony. This is correct. The court, however, did not have power to vacate the decree in its entirety. The Ernest Fosetti Brewing Company v. Koehler, 200 Ill. 369; Sim v. Sim, 247 Ill. App. 321.

The proper method of impeaching and setting aside a decree after the term, is to file an original bill in the nature of a bill of review, but the decree can not be set aside on a motion to vacate after the term has gone by. Sim v. Sim, 247 Ill. App. 321.

For the reasons stated in this opinion the order of the Superior Court vacating the decree is reversed and the cause remanded with directions to expunge said order vacating said decree from the record.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND FRIEND, JJ. CONCUR.

April 1, 1930, vesting said decree. The appeal is from this order and on the face of the record it is apparent that the order vesting the decree was entered after the term and after the court had lost jurisdiction to vacate the decree.

The appeal to this court is based apparently upon the notion to exchange the order vesting the decree from the record, but the effect of the appeal is to bring the entire order before this court for consideration. The records of the court in the decree must be taken as true and they show that a decree had been duly entered and after complaint had been satisfied.

It appears from the order that the court on April 1st, vacated the decree and that it did not have the power to do. It is insisted on behalf of counsel for the complainant Kewellius Hamilton, that the court had jurisdiction at any time after the entry of its decree to change, alter or modify the provision in regard to the payment of alimony. This is correct. The court, however, did not have power to vacate the decree in its entirety. The Kewellius Hamilton v. Kewellius Hamilton, 300 Ill. 302, 347 Ill. App. 321.

The proper method of impeaching and setting aside a decree after the term, is to file an original bill in the name of a bill of review, but the decree can not be set aside on a motion to vacate after the term has gone by. Ill. v. Ill. App. 321. For the reasons stated in this opinion the order of the Superior Court vesting the decree is reversed and the cause remanded with directions to exchange said order vesting said decree from the record.

REVEREND AND HONORABLE WITH DIRECTIONS.

HERN AND FRIEND, J. CONCUR.

34536

JOHN G. SEGER, et al,
Complainants - Appellants,
v.
CHARLES E. GRUENBERG, et al,
Defendant - Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

260 I.A. 625

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The record in this cause shows a bill filed by the complainants February 15, 1930, seeking to review a decree previously entered in the Superior Court of Cook County. All the defendants were served and entered their appearance and filed a demurrer to the bill and, on April 21, 1930, the demurrer was sustained and leave given complainants to file their amended bill of complaint, which was done.

May 9, 1930, a demurrer was filed to the amended bill and by stipulation filed May 10, 1930, the demurrer to the amended bill was set for argument on the contested motion calendar for May 12, 1930. On that day a hearing on the demurrer to the amended bill was had and, counsel for complainants failing to appear, an order was entered dismissing the cause for want of equity. The order in question reads as follows:

"On motion of solicitor for defendants this cause coming on to be heard on the demurrer filed to the amended bill of complaint and the court having considered the same and being advised in the matter, it is ordered that the demurrer be and the same is hereby sustained and the cause is dismissed for want of equity."

May 16, 1930, complainants entered their motion to vacate the order of May 12th, and the motion was set for hearing and argument on June 2, 1930. After a hearing on the motion by the chancellor, the following order was entered:

JOHN C. STUBBS, et al.,
Complainants - Appellants,
v.
CHARLES E. STUBBS, et al.,
Defendants - Appellees.

AT THE COURT
SUPERIOR COURT,
COOK COUNTY,
ILLINOIS.

FILED
MAR 11 1931

Opinion filed March 11, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of
the court.
The record in this cause shows a bill filed by the
complainants February 18, 1930, seeking to review a decree previously
entered in the Superior Court of Cook County. All the defendants
were served and entered their appearance and filed a demurrer
to the bill and, on April 21, 1930, the demurrer was sustained
and leave given complainants to file their amended bill of complaint,
which was done.
May 3, 1930, a demurrer was filed to the amended bill
and by stipulation filed May 10, 1930, the demurrer to the amended
bill was set for argument on the contested motion calendar for
May 13, 1930. On that day a hearing on the demurrer to the amended
bill was had and, counsel for complainants failing to appear, an
order was entered dismissing the cause for want of equity. The
order in question reads as follows:
"On motion of solicitor for defendants this cause
coming on to be heard on the demurrer filed to the amended
bill of complaint and the court having considered the same
and being advised in the matter, it is ordered that the
demurrer be and the same is hereby sustained and the cause
is dismissed for want of equity."
May 18, 1930, complainants entered their motion to
vacate the order of May 13th, and the motion was set for hearing
and argument on June 2, 1930. After a hearing on the motion of
the chancellor, the following order was entered:

"On motion of solicitor for defendants, this cause coming on to be heard upon motion of complainants to vacate the order of May 12, 1930, and the Court having heard arguments of counsel and being fully advised in the matter, doth hereby order that the motion be and is hereby denied."

An exception was taken to this order and an appeal prayed and allowed to this court. The exception taken at the time was in words and figures as follows:

"To the entry of the order denying the motion of complainants to vacate the order of May 12, 1930, and to modify the same, the complainants except on the ground that the solicitor for complainants nor anyone for complainants argued said demurrer, that the Court sustained said demurrer and dismissed said Amended Bill without argument or being advised in the premises that there is equity in said Amended Bill, and said complainants pray an appeal to the Appellate Court of Illinois, First District, which appeal is hereby allowed upon the complainants filing their bond in the penal sum of \$200, with surety, in thirty days, and a Certificate of Evidence as to said motion to vacate in sixty days."

The first assignment of error is as follows:

"1. The Court erred in sustaining the demurrer to the amended bill and dismissing same for want of equity."

A motion was made to strike this assignment of error from the record on the ground that the appeal was not from the original decree dismissing the bill for want of equity, but from the order denying the motion to vacate and that, therefore, this court has not before it the question as to whether or not the demurrer to the amended bill should have been sustained and the cause dismissed for want of equity. This motion to strike the assignment of errors from the record was reserved to the hearing of this cause. It is clear from a reading of the record that no appeal is before this court involving the question as to the action of the court in sustaining the demurrer to the amended bill and dismissing the cause for want of equity. The appeal is from the entry of the order denying the motion of complainants to vacate the order of May 12th. An appeal from an order denying a motion to set aside a judgment does not bring the whole case before this court for review. Lake Shore Sand Co. v. Goodman, 85 Ill. App. 354.

"On motion of solicitor for respondents, this cause coming on to be heard upon motion of complainants to vacate the order of May 15, 1930, and the Court having heard arguments of counsel and being fully advised in the matter, both hereby order that the action be and is hereby denied."

An exception was taken to this order and an appeal prayed and allowed to this court. The exception taken at the time was in words and figures as follows:

"To the entry of the order denying the motion of complainants to vacate the order of May 15, 1930, and to modify the same, the complainants except on the ground that the solicitor for respondents nor anyone for complainants argued said demurrer, that the Court sustained said demurrer and dismissed said amended bill without argument or being advised in the premises that there is equity in said amended bill, and said complainants pray an appeal to the Appellate Court of Illinois, first district, which appeal is hereby allowed upon the complainants filing their bond in the penal sum of \$500, with security, in thirty days, and a certificate of judgment as to said action to vacate in sixty days."

The first assignment of error is as follows:

"1. The Court erred in sustaining the demurrer to the amended bill and dismissing same for want of equity."

A motion was made to strike this assignment of error from the record on the ground that the appeal was not from the original decree dismissing the bill for want of equity, but from the order denying the motion to vacate and that, therefore, this court has no before it the question as to whether or not the demurrer to the amended bill should have been sustained and the cause dismissed for want of equity. This motion to strike the assignment of error from the record was referred to the hearing of this cause. It is clear from a reading of the record that no appeal is before this court involving the question as to the action of the court in sustaining the demurrer to the amended bill and dismissing the cause for want of equity. The appeal is from the entry of the order denying the motion of complainants to vacate the order of May 15th. An appeal from an order denying a motion to set aside a judgment does not bring the whole case before this court for review. Lake Shore Sand Co. v. Goodman, 88 Ill. App. 384.

The case of Hosking v. Southern Pacific Co., 243 Ill. 320, cited by counsel for complainant, is distinguishable as that was an appeal from the judgment and not from the motion to vacate.

The certificate of evidence filed in the cause consists of a colloquy between counsel and court. It is insisted that it appears from the certificate of evidence that the court insisted upon the payment of \$50 as a condition under which he would set aside the order sustaining the demurrer and dismissing the amended bill. There are no affidavits filed in support of the motion nor was there any testimony taken. As every intendment is given in favor of the original order, it is presumed that the statements therein contained, "the court having considered the bill and being advised in the matter", are correct. The court in the case of Village of LaGrange Park v. Hess, 332 Ill. 236, says:

"Whether or not a court should vacate and set aside judgments and orders previously made rests in the sound legal discretion of the court, depending upon the facts presented. It is only where that sound legal discretion has been abused or improperly exercised that a court of review will reverse a judgment based on such a proceeding. (Trentler v. Halligan, 86 Ill. 39.)"

The brief filed by complainant in this court consists entirely of an argument based upon the soundness of the amended bill and the matters therein contained. As we have stated, this is not before us for consideration. In order to have brought this matter before us, the appeal should have been from the order dismissing the bill for want of equity entered May 12, 1930. Reserve v. Clark, Jr., 115 Ill. 530.

Counsel insists that the court had no right to demand a payment of \$50 as a condition for setting aside the order of May 12th, but there is nothing in the record showing such to be the fact, except the statement of counsel. It not infrequently happens that courts will set aside orders upon conditions, particularly where the conduct or neglect of counsel has been of such a character

The case of Hooking v. Southern Pacific Co., 253 Ill.

330, cited by counsel for complainant, is distinguishable in that
was an appeal from the judgment and not from the motion to vacate.
The certificate of evidence filed in the cause consists

of a colloquy between counsel and court. It is insisted that it

appears from the certificate of evidence that the court insisted

upon the payment of \$50 as a condition under which he would set

aside the order sustaining the demurrer and dismissing the amended

bill. There are no affidavits filed in support of the motion nor

was there any testimony taken. As every judgment is given in

favor of the original order, it is presumed that the statements

therein contained, "the court having considered the bill and being

advised in the matter", are correct. The court in the case of

Wills v. Lawrence Park v. Mead, 253 Ill. 326, says:

"Whether or not a court should vacate and set aside
judgments and orders previously made rests in the sound
legal discretion of the court, depending upon the facts
presented. It is only where there is some legal discretion
has been shown or improperly exercised that a court of
review will reverse a judgment based on such a proceeding."
Trentler v. Halliday, 25 Ill. 39.

The bill filed by complainant in this court consists

entirely of an agreement made upon the soundness of the amended bill

and the matters therein contained. As we have stated, this is not

before us for consideration. In order to have brought this matter

before us, the appeal should have been from the order dismissing

the bill for want of equity entered May 13, 1930. Heesive v.

Clark, 27, 115 Ill. 583.

Counsel insist that the court had no right to demand

a payment of \$50 as a condition for setting aside the order of

May 13th, but there is nothing in the record showing such to be the

fact, except the statement of counsel. It not infrequently happens

that courts will set aside orders upon conditions, particularly

where the conduct or neglect of counsel has been of such a character

as to cause a hardship to the other side. There being no appeal from the order dismissing the bill, and the only matter before us being an appeal from the order refusing to vacate the previous order of the court, we are unable to say that the court abused its discretion in refusing to vacate its original order. If complainant was of the opinion that its amended bill was good, it should have reserved for consideration in this court the amended bill and the order overruling or sustaining the demurrer for our consideration upon a proper appeal from that judgment order.

For the reasons stated in this opinion, the order of June 2nd, denying the motion to vacate the order entered May 12, 1930, is affirmed and the appeal dismissed.

APPEAL DISMISSED.

HEBEL AND FRIEND, JJ. CONCUR.

as to cause a hardship to the other side. There being no appeal from the order dismissing the bill, and the only matter before us being an appeal from the order refusing to vacate the previous order of the court, we are unable to say that the court abused its discretion in refusing to vacate its original order. If compliance was of the opinion that its amended bill was good, it should have reserved for consideration in this court the amended bill and the order overruling or sustaining the demurrer for our consideration upon a proper appeal from that judgment order.

Yet the reasons stated in this opinion, the order of June 2nd, denying the motion to vacate the order entered May 12, 1930, is affirmed and the appeal dismissed.

WITNESSED my hand and the seal of the court at St. Louis, Missouri, this 12th day of June, 1930.

HERBERT AND THOMAS, JJ. CONCUR.

34129

LOUISE BUTLER,

Appellee,

v.

JOHN R. THOMPSON COMPANY,
a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

200 Ill. C25

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an action in trespass on the case for personal injuries, brought by Louise Butler against John R. Thompson Company and Michigan-Ohio Building Corporation. Trial was had before a jury and a verdict returned for \$25,000. The Michigan-Ohio Building Corporation was dismissed on motion of plaintiff after verdict. The court ordered a remittitur of \$11,000, and entered judgment against the John R. Thompson Company for \$14,000, from which this appeal is prosecuted.

The material facts disclose that on April 4, 1928, defendant was a tenant in the Michigan-Ohio Building at the northwest corner of Ohio Street and Michigan Avenue, in Chicago, Illinois; that there was installed in said building a so-called sidewalk elevator used to raise material from the basement of the building to the ground floor; that the elevator was immediately below the sidewalk on the north side of the Ohio Street side of the building, and when the elevator was raised there were trap doors in the sidewalk which raised with it and the doors opening to the east and west formed an obstruction to travel on the sidewalk; that on the day in question plaintiff was walking east on Ohio Street and as she approached the trap doors they were slowly opened by an employe of defendant causing the plaintiff to stumble over the door and fall to the sidewalk and sustain injuries to her knee, vertebra and abdominal regions.

34123

LOUISE BUTLER,

Appellee,

v.

JOHN R. THOMPSON COMPANY,
a Corporation,

Appellant.

SUPERIOR COURT

COOK COUNTY.

Case No. 11, 1931

Opinion filed March 11, 1931

MR. JUSTICE FRANK delivered the opinion of the court.

This is an action in trespass on the case for

personal injuries, brought by Louise Butler against John R. Thompson Company and Michigan-Chicago Building Corporation. Trial

was had before a jury and a verdict returned for \$25,000. The

Michigan-Chicago Building Corporation was dismissed on motion of

plaintiff after verdict. The court entered a remittitur of

\$11,000, and entered judgment against the John R. Thompson

Company for \$14,000, from which this appeal is prosecuted.

The material facts disclosed that on April 4, 1928,

defendant was a tenant in the Michigan-Chicago Building at the
northwest corner of Ohio Street and Michigan Avenue, in Chicago,

Illinois; that there was installed in said building a so-called

sidewalk elevator used to raise material from the basement of

the building to the ground floor; that the elevator was in-

mediately below the sidewalk on the north side of the Ohio

Street side of the building, and when the elevator was raised

there were trap doors in the sidewalk which raised with it and

the doors opening to the east and west formed an obstruction

to travel on the sidewalk; that on the day in question plaintiff

was walking east on Ohio Street and as she approached the trap

doors they were slowly opened by an employee of defendant causing

the plaintiff to stumble over the door and fall to the sidewalk

and sustain injuries to her knee, vertebrae and abdominal region.

Plaintiff was about twenty-three years of age at the time of the trial; her home was in Kearney, Nebraska, where she obtained a public school education. She later attended the Nebraska State Teachers' College. In 1926 she taught school for a year at a salary of \$1500, and at the same time gave private instruction in dramatic work for which she received additional compensation. While at the college she became acquainted with Mrs. Ralph Parlette, her instructor in dramatics, who brought her to Chicago in August, 1927, for further study. Her training continued under Mrs. Parlette's tutelage from August to December of that year. Following her study in Chicago plaintiff was employed with the Rockford Players at Rockford, Illinois, at a salary of \$90 for the first week and \$60 per week thereafter. This engagement lasted but a short time, after which she returned to Chicago for further training. In the fall of 1927 and the spring of 1928 plaintiff gave three recitals, one at the Congress Hotel before the Electronic Convention, another at the Starrett School for Girls, and the third for the Chicago Woman's Club. In addition to these recitals she rendered vocal selections and did some dancing before various clubs and organizations. Plaintiff contends that shortly before the accident she entered into an oral agreement with Mrs. Parlette by which she placed herself under the exclusive management of the latter for one year at a stipulated salary of \$5,000. Several tentative recitals had been arranged for plaintiff when the accident occurred. The existence of this agreement, testified to by both plaintiff and Mrs. Parlette, is questioned by defendant, who argues that the limited experience of plaintiff would have made such an agreement improbable, but there is no evidence to contradict the testimony of these two witnesses.

Defendant raises no question as to its liability for

Plaintiff was about twenty-three years of age at the time of the trial; her name was in Kentucky, Kentucky, where she obtained a public school education. She later attended the Kentucky State Teachers' College. In 1938 she taught school for a year at a salary of \$1800, and at the same time gave private instruction in dramatic work for which she received additional compensation. Plaintiff was employed by the defendant as a teacher at the defendant's school in Kentucky, where she was employed from August, 1937, to August, 1938, for further study. Her training continued under Mrs. Plaintiff's supervision from August to December of that year. Following her study in Chicago Plaintiff was employed with the Goodford Players at Goodford, Illinois, at a salary of \$80 for the first week and \$60 for each subsequent week. This engagement lasted but a short time, after which she returned to Chicago for further training. In the fall of 1937 and the spring of 1938 Plaintiff gave three recitals, one at the Congress Hotel before the Electronic Convention, another at the University School for Girls, and the third for the Illinois School of Music. In addition to these recitals she rendered vocal recitations and did some dancing before various clubs and organizations. Plaintiff contends that shortly before the recital she entered into an oral agreement with Mrs. Plaintiff by which she agreed to perform under the exclusive management of the latter for one year at a stipulated salary of \$2,000. Several tentative recitals had been arranged for Plaintiff when the recital occurred. The existence of this agreement, testified to by both Plaintiff and Mrs. Plaintiff, is questioned by defendant, who argues that the alleged experience of Plaintiff would have made such an agreement improbable, but there is no evidence to contradict the testimony of these two witnesses.

Defendant raises no question as to its ability for

the injuries sustained by plaintiff, but urges that the verdict is excessive and that it was induced by passion and prejudice, resulting from several incidents that occurred upon the trial of the case.

The first of these incidents occurred when an attorney by the name of Mayer entered the court room while the case was on trial, sat down on the plaintiff's side of the table, and entered into conversation with one of the plaintiff's attorneys in the presence of the jury and while plaintiff was on the witness stand. At the noon adjournment defendant's counsel observed Mayer talking with Maxwell Bennett, one of the jurors. The matter was called to the court's attention out of the presence of the jury. Mayer was examined by the court and stated that he knew Bennett, but denied having discussed with him any matter pertaining to the case on trial. Plaintiff's counsel called the court's attention to the fact that Mayer also spoke to defendant's attorney while seated at the table, but this statement was denied. At the close of the discussion the court said:

"Now, the Court's statement will be this, that after consulting with Mr. Mayer who was the person who talked with the juror, and after talking to lawyers, the Court is satisfied that there was nothing said between Mr. Mayer and the juror Mr. Bennett with reference to this case, and the Court will deny the motion of Mr. Bloomington to withdraw a juror and continue the case."

In the case of City of Beardstown v. Smith, 150 Ill. 169, it was shown that while the case was in progress and as the court took a recess for dinner, the plaintiff and one of the jurors walked together a part of the way from the courthouse to the hotel where both were boarding, and that while so walking together they were engaged in conversation with each other. With reference to this incident the court in its opinion said:

the injuries sustained by plaintiff, but urges that the verdict is excessive and that it was induced by passion and prejudice, resulting from several incidents that occurred upon the trial of the case.

The first of these incidents occurred when an attorney by the name of Meyer entered the court room while the case was on trial, sat down on the plaintiff's side of the table, and entered into conversation with one of the plaintiff's attorneys in the presence of the jury and while plaintiff was on the witness stand. At the adjournment defendant's counsel observed Meyer talking with Maxwell Bennett, one of the jurors. The matter was called to the court's attention out of the presence of the jury. Meyer was examined by the court and stated that he knew Bennett, but stated having discussed with him any matter pertaining to the case on trial, plaintiff's counsel called the court's attention to the fact that Meyer also spoke to defendant's attorney while seated at the table, but this statement was denied. At the close of the discussion the court said:

"Now, the Court's attention will be that, after consulting with Mr. Meyer who was the person who sat down with the jury, and after talking to the jury, the Court is satisfied that there was nothing said between Mr. Meyer and the juror Mr. Bennett with reference to this case, and the Court will deny the motion of Mr. Alexander to withdraw a juror and continue the case."

In the case of City of Henderson v. Welch, 150 Ill. 183, it was shown that while the case was in progress and as the jury took a recess for dinner, the plaintiff and one of the jurors walked together a part of the way from the courthouse to the hotel where both were dining, and that while so walking together they were engaged in conversation with each other. With reference to this incident the court in its opinion said:

"Conduct of this character between a party to a suit and a juror during the progress of the trial is reprehensible, and unexplained, is usually sufficient to warrant the trial judge in setting aside the verdict and awarding a new trial. By way of explanation, however, it was shown that the distance between the court house and the hotel was but a few steps; that the juror's overtaking the plaintiff on her way to the hotel was purely accidental, and that nothing whatever was said between them in relation to the suit, but that their conversation was wholly upon indifferent matters, the subject of which neither was able to remember afterwards. In view of these explanations, we think this conduct, though improper, could not have materially prejudiced the defendant, and that it ought not therefore to be a ground for a new trial."

In Hairgrove v. Curtiss, et al., 57 Ill. App. 448, it was held that a conversation between a juror and an agent of one of the parties to a suit, had during an intermission of the court while the case was on trial, is not ground for a reversal of the judgment rendered, if it be shown that the conversation was casual, had no reference to the case, and was very brief and in no wise private or clandestine, but open and in the presence of others.

The court after interviewing Mayer was evidently satisfied that there was nothing said between him and the juror with reference to the case, and we do not believe the incident was of such a nature as to have influenced the verdict.

At another time during the trial the court has handed a copy of the Chicago Evening American, in which there appeared a portrait of the plaintiff with the following printed material subjoined:

"A jury today is hearing the case of Miss Louise Butler, 22, a concert pianist who seeks \$100,000 for injuries received when a sidewalk elevator struck her. She suffered injuries to her spine and a broken knee-cap."

The court considered the matter in chambers out of the presence of the jury and at the conclusion of a discussion with counsel stated:

"Conduct of this character between a party to a suit and a juror during the progress of the trial is reprehensible, and unquestioned, is usually sufficient to warrant the trial judge in setting aside the verdict and granting a new trial. By way of explanation, however, it was shown that the distance between the court house and the hotel was but a few steps; that the juror's overlooking the plaintiff on her way to the hotel was purely accidental, and that nothing whatever was said between them in relation to the suit, but that their conversation was wholly upon indifferent matters, the subject of which neither was able to remember afterwards. In view of these explanations, we think this conduct, though improper, could not have materially prejudiced the defendant, and that it ought not therefore to be a ground for a new trial."

In Holmes v. Burton, 22 Ill. App. 448, it

was held that a conversation between a juror and an agent of one of the parties to a suit, had during an intermission of the court while the case was on trial, is not ground for a reversal of the judgment rendered, if it is shown that the conversation was casual, had no reference to the case, and was very brief and in no wise private or suggestive, but open and in the presence of others.

The court after interviewing voter was evidently satisfied that there was nothing said between him and the juror with reference to the case, and we do not believe the incident was of such a nature as to have influenced the verdict.

At another time during the trial the court had handed a copy of the Chicago Evening American, in which there appeared a portrait of the plaintiff with the following printed caption and captioned:

"A jury today is hearing the case of Miss Louise Burton, 22, a concert pianist who seeks \$100,000 for injuries received when a wheel fell from a broken trolley. The wheel fell from the car when she was riding."

The court considered the matter in chambers out of the presence of the jury and at the conclusion of a discussion with counsel stated:

"Well, I do not know how it would influence the jury. They have seen her. Before they saw the picture they had seen her in the court room. The fact is what is written under this picture, they say she is suing for this sum of money and she is suing for injuries, and even if the injuries are considered they can only consider the evidence from the witness stand and the necessary proof, the legitimate proof that can be put in."

We believe, as the court stated, that the appearance of the plaintiff's picture with the subjoined article added nothing to the information which the jury already had about plaintiff and her claim. Moreover there was no showing made that any of the jurors had seen or read the article, and consequently they could not have been influenced thereby.

When plaintiff's mother took the witness stand the following occurred:

"Q. And with whom were you living there? Of what did your family consist? A. My husband -

Mr. Bloomington: Wait a minute, that isn't competent for any purpose, if the court please.

The Court: Sustained.

Mr. Johnston: Is your husband living?

Mr. Bloomington: That is objected to if the court please.

A. He is not.

Mr. Bloomington: Wait a minute.

The Court: Don't answer.

Mr. Johnston: I think I have a right to account for the witness, your Honor. That is what I am doing.

Mr. Bloomington: Wait a minute. Let us go into chambers."

Out of the presence of the jury defendant moved to withdraw a juror, contending that the question was improper and calculated to appeal to the sympathy of the jury. The court, however, denied the motion, and we think properly so. Defendant cites the cases of McCarthy v. Spring Valley, 232 Ill. 479, and Jones & Adams Co. v. George, 227 Ill. 64, in support of its contention that these questions were prejudicial and constitute

"Well, I do not know how it would influence the jury. They have seen her. Before they saw the picture they had seen her in the court room. The fact is what is written under this picture, they may see it and say this and that and she is being for injustice, and even if the injustice are considered they can only consider the evidence from the witness stand and the necessary truth, the legitimate proof that can be put in."

As the court stated, that the appearance of the plaintiff's picture with the subpoenaed article added nothing to the information which the jury already had about plaintiff and her claim. Moreover there was no showing made that any of the errors had been or need the article, and consequently they could not have been influenced thereby.

When plaintiff's mother took the witness stand the following occurred:

"Q. And with whom were you living then? Of what and your family consisted? By counsel -

Mr. Bloomington: With a friend, that is, completed for my purpose, if the court please. The Court: Sustained. Mr. Johnston: Is your husband living?

Mr. Bloomington: That is objected to it is the Court please.

A. He is not.

Mr. Bloomington: With a friend.

The Court: Don't answer.

Mr. Johnston: I think I have a right to account for the witness, your honor. That is what I am doing.

Mr. Bloomington: With a friend. Let us go into "character."

Out of the presence of the jury defendant moved to withdraw a letter, contending that the question was improper and submitted to appeal to the sympathy of the jury. The court, however, denied the motion, and we think properly so. Defendant cites the cases of Bohannon v. Bohannon, 122 Ill. 473, and Jones & Adams Co. v. George, 127 Ill. 64, in support of its contention that these questions were prejudicial and constitutes

reversible error. An examination of these citations shows that in the first case a statement was made to the jury that appellee had a wife and five children. The court said that the only object of this statement could have been to enhance the damages by getting before the jury in an improper and unprofessional manner facts calculated to arouse their sympathy, which counsel knew could not in a legitimate way be brought to their attention. In the second case appellee was allowed to prove that he was a married man and had three children. This evidence was objected to and the objection overruled. The court in its opinion states that the damages recoverable could only be compensatory and that therefore the domestic relations, financial standing and circumstances of the parties were irrelevant. In both of these cases the probable loss of support by the families of the plaintiffs, if shown, might constitute an element in the assessment of damage and the family relationships injected into the trials were therefore manifestly improper. In the case before us, however, the mother is not the plaintiff, nor is she interested in the result of the suit, nor was there any attempt to show that the mother was dependent upon the plaintiff for support, care or maintenance. The only purpose of the question, as stated by counsel, was to show that plaintiff's father was dead and thereby account for his absence as a witness in the case.

The remaining incidents have to do with alleged flirtations of the plaintiff with one of the jurors. An attorney named Craven reported the matter to defendant's counsel. The court interrogated Craven out of the presence of the jury, and he testified that he had seen the plaintiff smile and at the same time one of the jurors also smiled, but that he could not say positively whether they were smiling at each other, although it appeared so to him. At the same time complaint was made to the

reversible error. An examination of these statements shows that in the first case a statement was made to the jury that appellee had a wife and five children. The court said that the only object of this statement could have been to enhance the damages by getting before the jury in an improper and unprofessional manner facts calculated to arouse their sympathy, which counsel knew could not in a legitimate way be brought to their attention. In the second case appellee was allowed to prove that he was a married man and had three children. This evidence was objected to and the objection overruled. The court in its opinion states that the damages recoverable could only be compensatory and that therefore the domestic relations, financial standing and circumstances of the parties were irrelevant. In both of these cases the probable loss of support by the families of the plaintiffs, it shown, might constitute an element in the assessment of damages and the family relationships injected into the trials were therefore manifestly improper. In the case before us, however, the mother is not the plaintiff, nor is she interested in the result of the suit, nor was there any attempt to show that the mother was dependent upon the plaintiff for support care or maintenance. The only purpose of the question, as stated by counsel, was to show that plaintiff's father was dead and thereby account for his absence as a witness in the case.

The remaining incidents have to do with alleged limitations of the plaintiff with one of the jurors. An attorney named Graves reported the matter to defendant's counsel. The court interrogated Graves out of the presence of the jury, and he testified that he had seen the plaintiff smile and at the same time one of the jurors also smiled, but that he could not say positively whether they were smiling at each other, although it appeared so to him. At the same time complaint was made to the

court that plaintiff had talked to the wife of one of the jurors, and affidavits of Margaret Baker and Anna Deaks, two of defendant's witnesses who had already testified and were sitting in the court room, were presented to substantiate this charge. The affidavits state in substance that during a recess plaintiff and one of her witnesses sat on the same bench in the court room together with a juror and his wife, and they all were apparently smiling and friendly to each other. One Parcells, of the Soule Secret Service, engaged by defendant to watch plaintiff during the course of the trial, contradicted the effect of these affidavits by stating to the court that during this same recess he observed plaintiff sitting at the lawyers' table and there pointed her out to his men so that they might observe her. The record also contains an affidavit of the juror who is alleged to have smiled at plaintiff, denying such action and stating further that his wife was present in the court room waiting for a recess; that they had only recently been married and were having domestic difficulties and that she had come there to talk to him during recess; that his wife had not conversed with plaintiff nor that he had at any time discussed the case with his wife. While such conduct on the part of litigants is manifestly improper, if committed, it appears that the trial court investigated the charges and satisfied itself that no improper influence had been exercised.

It is clearly the rule in this state that if the reviewing court is unable to account for the size of the verdict by any reasonable view of the evidence except upon the theory that such verdict was the result of passion, prejudice, or a misconception by the jury of the evidence upon the question of damages, it cannot be cured by the allowance of a remittitur. Richter v. Tegtmeyer, 167 Ill. App. 478; Giehl v. Winkler, 164

court that plaintiff had talked to the wife of one of the jurors, and affidavits of Margaret Baker and Anna Deane, two of defendant's witnesses who had already testified and were sitting in the court room, were presented to substantiate this charge. The affidavit states in substance that during a recess plaintiff and one of her witnesses sat on the bench in the court room together with a juror and his wife, and they all were apparently smiling and friendly to each other. One parcelle, of the Geule Georot Service, engaged by defendant to watch plaintiff during the course of the trial, contradicted the effect of these affidavits by stating to the court that during this same recess he observed plaintiff sitting at the lawyers' table and there pointed her out to him when he thought she was observing her. The record also contains an affidavit of the juror who is alleged to have talked to plaintiff, denying such action and stating further that his wife was present in the court room waiting for a recess; that they had only recently been married and were having domestic difficulties and that she had come there to talk to him during recess; that his wife had not conversed with plaintiff nor that he had at any time discussed the case with his wife. While such conduct on the part of witnesses is manifestly improper, it is admitted, it appears that the trial court investigated the charges and satisfied itself that no improper influence had been exercised.

It is clearly the rule in this state that if the reviewing court is unable to account for the size of the verdict by any reasonable view of the evidence except upon the theory that such verdict was the result of passion, prejudice, or a misconception by the jury of the evidence upon the question of damages, it cannot be cured by the allowance of a remittitur. Nichter v. Toffmeyer, 187 Ill. App. 478; Giant v. Gindler, 184

Ill. App. 358. The record in this case, however, does not indicate that the jury based its verdict upon the foregoing incidents nor that they were swayed by an prejudice or passion resulting therefrom. The cases cited in defendant's brief to support its contention that prejudice is presumed from the fact that the jurors were talked to are not applicable to this case. All of them except one are criminal cases, where the bailiffs in charge of the juries allowed individual members of the juries to become separated either during the course of the trial or while their verdict was being considered, and the courts simply held in effect that juries should be protected from every improper influence, but that a failure to do so could not absolutely or without some evidence that prejudice or injury had resulted therefrom vitiate a verdict or constitute a cause for a new trial.

There remains, therefore, only the question whether the verdict was excessive with reference to the injuries sustained by plaintiff. Upon this question there is a mass of conflicting evidence consuming the greater portion of a record of more than 1,000 pages. Even the manner in which the plaintiff fell when she became injured is the subject of controversy. Defendant insists that according to the testimony of witnesses and other circumstances in evidence, she stumbled forward and fell on her right knee and hands and that a fall in this manner could not possibly have injured her knee, vertebra and abdominal parts all at the same time. Plaintiff, however, contends that she plunged forward with her right leg from the knee down flexed underneath her thigh, landing partly on her knee, right hip and the base of her spine. She claims to have sustained fractures of her knee cap and of the right lateral process of the fifth lumbar vertebra, besides other severe injuries. These are denied and minimized by defendant. The record contains the testimony of numerous

Ill. App. 358. The record in this case, however, does not indicate that the jury based its verdict upon the foregoing incidents nor that they were swayed by an prejudice or passion resulting therefrom. The reason cited in defendant's brief to support its contention that prejudice is presumed from the fact that the jurors were talked to are not applicable to this case. All of them except one are original jurors, where the practice in charge of the jurist allowed individual members of the jurist to become separated either during the course of the trial or while their verdict was being considered, and the court simply held in effect that jurors should be protected from every improper influence, but that a failure to do so could not absolutely or without some evidence that prejudice or injury had resulted therefrom vitiate a verdict or constitute a cause for a new trial.

There remains, therefore, only the question whether the verdict was excessive with reference to the injuries sustained by plaintiff. Upon this question there is a record of more than evidence concerning the greater portion of a record of more than 1,000 pages. Even the manner in which the plaintiff fell when she became injured is the subject of controversy. Defendant insists that according to the testimony of witnesses and other circumstances in evidence, she stumbled forward and fell on her right knee and hands and that a fall in this manner could not possibly have injured her knee, vertebrae and abdominal parts all at the same time. Plaintiff, however, contends that she plunged forward with her right leg from the knee down linked underneath her thigh, landing partly on her knee, right hip and the base of her spine. She claims to have sustained fractures of her knee, upward of the right lateral process of the fifth lumbar vertebra, besides other nervous injuries. These are denied and minimized by defendant. The record contains the testimony of numerous

witnesses upon the character of plaintiff's injuries and the elements of damages to be considered by the jury. X-ray photographs are in evidence together with explanations thereof by experts, all bearing on the nature and extent of the injuries. The jury had all this evidence before them, heard the testimony of physicians and lay witnesses, and had an opportunity to pass upon the credibility of all who testified and to determine the facts in the case. There is nothing to indicate that they arrived at a verdict upon any basis except all of the evidence produced. No question is raised as to the admissibility or incompetency of the evidence nor ^{is} any objection made to the instructions given to the jury. From a careful examination of the record, as shown by the abstract, we cannot say that the verdict is contrary to the manifest weight of the evidence, or that the jury misconceived the evidence as bearing upon the question of damages. Several salient facts appear in the record and are not seriously disputed. Plaintiff was confined to her bed for approximately two months with splints and bandages on her leg and body, one extending from her ankle to her hip and another from her hip to her shoulders wired in such a position as to prevent any movement of her body. She lost about thirty pounds during this period, suffered acute pain and her usefulness as an entertainer in dancing and dramatics was impaired for a considerable period of time, if not permanently. The verdict was reduced to \$14,000 by remittitur and we believe that there is abundant evidence in the record from which the jury may well have found injuries sustained by plaintiff to that extent. Accordingly we are not inclined to disturb the judgment as remitted, either on the ground of its being excessive in the light of the evidence bearing upon the character and extent of the injuries, or because of the incidents that occurred during the trial of the case.

witnesses upon the character of plaintiff's injuries and the elements of damages to be considered by the jury. X-ray photographs are in evidence together with explanations thereof by experts, all bearing on the nature and extent of the injuries. The jury had all this evidence before them, heard the testimony of physicians and lay witnesses, and had an opportunity to pass upon the credibility of all who testified and to determine the facts in the case. There is nothing to indicate that they arrived at a verdict upon any basis except all of the evidence produced. No question is raised as to the admissibility or incompetency of the evidence ^{is} nor any objection made to the instructions given to the jury. From a careful examination of the record, as shown by the transcript, we cannot say that the verdict is contrary to the manifest weight of the evidence, or that the jury misapprehended the evidence as bearing upon the question of damages. Several salient facts appear in the record and are not seriously disputed. Plaintiff was confined to her bed for approximately two months with sprains and bruises on her leg and body, one extending from her ankle to her hip and another from her hip to her shoulder blades in such a position as to prevent any movement of her body. The last about thirty wounds during this period, suffered severe pain and her restlessness as an entertainer in dancing and dramatics was impaired for a considerable period of time, if not permanently. The verdict was reached to \$14,000 by plaintiff and we believe that there is abundant evidence in the record from which the jury may well have found injuries sustained by plaintiff to that extent. Accordingly we are not inclined to disturb the judgment as rendered, either on the ground of its being excessive in the light of the evidence bearing upon the character and extent of the injuries, or because of the incidents that occurred during the trial of the case.

- 10 -

The judgment of the Superior Court will therefore be affirmed.

AFFIRMED.

WILSON, P.J. AND REBEL, J. CONCUR.

The judgment of the Superior Court will therefore be affirmed.

WITNESSES:

WILSON, P. J. AND NEBEL, A. C. J.

34159

MAX M. GROSSMAN,

Appellant,

vs.

TRANSPORTATION BANK OF
CHICAGO, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 625

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought an action in the Municipal Court of Chicago to recover \$250 and interest for the conversion by defendant of the proceeds of a check for said sum. Trial was had before the court without a jury and judgment entered in favor of defendant. It is sought by this appeal to reverse that judgment and procure the entry of a judgment in this court in favor of plaintiff for the amount of his claim together with interest thereon.

Plaintiff's statement of claim alleges that the defendant converted a check dated December 1, 1926, payable to his order in the sum of \$250, drawn on the defendant bank by the State Jewelry Company; that the endorsements "Max Grossman, Rose Pritikin" thereon are a forgery; that the defendant paid said check to the National Bank of Commerce for the account of Rose Pritikin and converted the proceeds of said check to its own use by reason of the payment thereof on the forged endorsement.

The affidavit of merits filed by defendant alleges that the check sued on was endorsed in the name of Max Grossman, Rose Pritikin and The National Bank of Commerce, and was deposited by Rose Pritikin for her account and credited to her in said bank about December 4, 1926; that Rose Pritikin was the agent and employe of plaintiff and was carrying on his business;

2601A.625

Opinion filed March 11, 1931

MR. JUSTICE BRIDGES delivered the opinion of the court.
Plaintiff brought an action in the Municipal Court of Chicago to recover \$250 and interest for the conversion by defendant of the proceeds of a check for said sum. Trial was had before the court without a jury and judgment entered in favor of defendant. It is sought by this appeal to reverse that judgment and procure the entry of a judgment in this court in favor of plaintiff for the amount of his claim together with interest thereon.

Plaintiff's statement of claim alleges that the defendant converted a check dated December 1, 1929, payable to his order in the sum of \$250, drawn on the defendant bank by the State Jewelry Company; that the endorsement "Max Grossman, Rose Fritskin" thereon are a forgery; that the defendant paid said check to the National Bank of Commerce for the account of Rose Fritskin and converted the proceeds of said check to its own use by reason of the payment thereof on the forged endorsement.

The affidavit of merits filed by defendant alleges that the check sued on was endorsed in the name of Max Grossman, Rose Fritskin and The National Bank of Commerce, and was deposited by Rose Fritskin for her account and credited to her in said bank about December 4, 1929; that Rose Fritskin was the agent and employe of plaintiff and was carrying on his business;

Appellee.
TRANSPORTATION BANK OF
CHICAGO, a corporation,
vs.
Appellant,
MAX M. GROSSMAN,
34125
MUNICIPAL COURT
OF CHICAGO.
APPEAL FROM

that on or about December 1, 1926 she drew among others a check on her account in the National Bank of Commerce for \$250, payable to the plaintiff, and endorsed and deposited the same in Foreman National Bank to the credit of the account of the plaintiff; that the checks drawn to the order of plaintiff on the National Bank of Commerce, totalling \$1,013.16, were thereafter presented to the National Bank of Commerce, endorsed in the name of the plaintiff and Foreman National Bank, and were on December 6, 1926, paid and charged to the account of Rose Pritikin; that the amount of money evidenced by the check sued on and others was credited by the Foreman National Bank to the account of plaintiff, or applied upon indebtedness due from plaintiff to said bank; that the plaintiff received the full amount of money evidenced by the check sued on, and that defendant has not converted the proceeds of said check, as alleged, but that the same were paid to the plaintiff.

It is conceded that the endorsement on the check in question was made by Rose Pritikin without plaintiff's knowledge or consent, but defendant contends that plaintiff received the proceeds of the check sued on, suffered no damage by reason of the forgery of his endorsement thereon, and therefore cannot maintain this suit against the defendant.

The facts disclose that Rose Pritikin had been in plaintiff's employ for about nine years prior to December 1, 1926; that her duties were those of a secretary and stenographer and included authority to make deposits for plaintiff at his bank; that the check sued on bearing plaintiff's forged endorsement and her own, together with other checks totalling \$1600, were on December 1, 1926, deposited by her in the National Bank of Commerce; that on the same day she drew two checks for \$250 each, payable to plaintiff, and deposited them to the credit of his

that on or about December 1, 1938 she drew among others a check on her account in the National Bank of Commerce for \$250, payable to the plaintiff, and endorsed and deposited the same in Foxman National Bank to the credit of the account of the plaintiff; that the check drawn to the order of plaintiff on the National Bank of Commerce, totaling \$1,013.10, were thereafter presented to the National Bank of Commerce, endorsed in the name of the plaintiff and Foxman National Bank, and were on December 2, 1938, paid and charged to the account of Rose Wittkin; that the amount of money evidenced by the check used on and others was credited by the Foxman National Bank to the account of plaintiff, or applied upon indebtedness due from plaintiff to said bank; that the plaintiff received the full amount of money evidenced by the check used on, and that defendant has not converted the proceeds of said check, as alleged, but that the same were paid to the plaintiff.

It is conceded that the endorsement on the check in question was made by Rose Wittkin without plaintiff's knowledge or consent, but defendant contends that plaintiff received the proceeds of the check used on, suffered no damage by reason of the forgery of his endorsement thereon, and therefore cannot maintain this suit against the defendant.

The facts disclose that Rose Wittkin had been in plaintiff's employ for about nine years prior to December 1, 1938; that her duties were those of a secretary and stenographer and included authority to make deposits for plaintiff at his bank; that the check used on bearing plaintiff's forged endorsement and her own, together with other checks totaling \$1800, were on December 1, 1938, deposited by her in the National Bank of Commerce; that on the same day she drew two checks for \$250 each, payable to plaintiff, and deposited them to the credit of his

account in the Foreman National Bank; that when these two checks were first presented to the Bank of Commerce payment thereof was refused because the checks with which Rose Pritikin had created her account with the latter bank had not cleared; that subsequently on December 6, 1926, some five checks, payable to plaintiff and drawn by Rose Pritikin against her account with the Bank of Commerce, were presented to that bank for payment and upon the endorsement of plaintiff's name on each of those checks being guaranteed by the Foreman Bank, the Bank of Commerce paid to the Foreman Bank \$1013.16 and charged the amount to the account of Rose Pritikin leaving a balance of \$16 in her account, which was paid to her, and together with the return of one of the checks deposited by her on December 1, 1926, closed her account with the bank.

The sole question of fact thus presented is whether the two checks of December 1, 1926, for \$250 each, drawn by Rose Pritikin on her account, payable to plaintiff, and deposited with the Foreman Bank for plaintiff's account and paid, constitute receipt by plaintiff of the proceeds of the check sued on.

Plaintiff argues that \$500 of the check of the Bank of Commerce was used to pay two checks drawn by Rose Pritikin on the Lake-State Bank on November 22, 1926, and not the check in question. These checks were payable to plaintiff and returned by the latter bank for lack of sufficient funds, but plaintiff's account was not debited therewith. Whether the Foreman Bank charged the account of plaintiff with \$500 on account of the two checks of November 22, 1926, or held them as unpaid items, the result would be the same, because in either event plaintiff's account received the benefit of \$500 when on December 6, 1926, the Bank of Commerce delivered to the Foreman Bank its check for \$1013.16 in payment of five checks drawn by Rose Pritikin on the Bank of Commerce and payable to plaintiff. For if this payment

account in the Foreman National Bank; that when these two checks were first presented to the Bank of Commerce payment thereof was refused because the checks were drawn upon Fritikin had created her account with the latter bank had not stated; that subsequently on December 6, 1936, some five checks, payable to plaintiff and drawn by Rose Fritikin against her account with the Bank of Commerce, were presented to that bank for payment and upon the endorsement of plaintiff's name on each of those checks being furnished by the Foreman Bank, the Bank of Commerce paid to the Foreman Bank \$1013.18 and charged the amount to the account of Rose Fritikin leaving a balance of \$16 in her account, which was paid to her, and together with the return of one of the checks deposited by her on December 1, 1936, closed her account with the bank.

The sole question of fact thus presented is whether the two checks of December 1, 1936, for \$500 each, drawn by Rose Fritikin on her account, payable to plaintiff, and deposited with the Foreman Bank for plaintiff's account and paid, constitute receipts by plaintiff of the proceeds of the check and on.

Plaintiff argues that \$500 of the check of the Bank of Commerce was used to pay two checks drawn by Rose Fritikin on the Lake-State Bank on November 22, 1936, and not the check in question. These checks were payable to plaintiff and returned by the latter bank for lack of sufficient funds, but plaintiff's account was not debited therefor. Whether the Foreman Bank charged the account of plaintiff with \$500 on account of the two checks of November 22, 1936, or paid them as unpaid items, the result would be the same, because in either event plaintiff's account received the benefit of \$500 when on December 6, 1936, the Bank of Commerce delivered to the Foreman Bank its check for \$1013.18 in payment of five checks drawn by Rose Fritikin on the Bank of Commerce and payable to plaintiff. For if this payment

had not been made by the Bank of Commerce to the Foreman Bank, the latter would manifestly have charged plaintiff's account with the amount of the two bad checks as unpaid items. We therefore believe the trial court properly found that plaintiff received the amount specified in the check sued on.

The law applicable to the foregoing facts is clearly established. It is conceded that a bank paying a check on a forged endorsement is liable to the payee of the check in an action in tort for the conversion. Hassell v. State Bank of West Pullman, 210 Ill. App. 373; Ranch v. Fort Dearborn National Bank, 223 Ill. 517. But where the payee receives and retains the proceeds of the check sued on, even though the money was obtained through the fraudulent or unauthorized endorsement of the check by his agent, he thereby ratifies the unauthorized act. It was so held in the case of Shaffner v. Edgerton, 13 Ill. App. 134, which is similar to the case before us. There an agent of plaintiff, without authority, endorsed plaintiff's name on some fifteen checks, collected and paid over the money to plaintiff, who accepted and received the same, and the court held that plaintiff would not be permitted, while holding the money, to allege the agent's want of authority, but construed the transaction as a ratification of the agent's unauthorized acts.

There being no other error assigned, we are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

had not been made by the Bank of Commerce to the Western Bank, the latter would manifestly have charged plaintiff's account with the amount of the two bad checks as unpaid items. We therefore believe the trial court properly found that plaintiff received the amount specified in the check sued on.

The law applicable to the foregoing facts is clearly established. It is conceded that a bank paying a check on a forged endorsement is liable to the payee of the check in an action in tort for the conversion. Hessell v. State Bank of West Pullman, 210 Ill. App. 323; Ward v. First National Bank, 235 Ill. 517. But where the payee receives and retains the proceeds of the check sued on, even though the money was obtained through the fraudulent or unauthorized endorsement of the check by his agent, he thereby ratifies the unauthorized act. It was so held in the case of Spiegel v. Spiegel, 12 Ill. App. 184, which is similar to the case before us. There an agent of plaintiff, without authority, endorsed plaintiff's name on some fifteen checks collected and paid over the money to plaintiff, who accepted and received the same, and the court held that plaintiff would not be permitted, while holding the money, to allege the agent's want of authority, but construed the transaction as a ratification of the agent's unauthorized acts.

There being no other error assigned, we are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

WILSON, P. J. AND HERBER, J. CONCUR.

34172

FRANK P. LANAHAN,

Appellee,

v.

LORAIN GREEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 626

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an appeal from a judgment entered by the Municipal Court of Chicago for \$68.20 in favor of plaintiff for damages sustained to his Nash automobile by reason of a collision with defendant's Buick at the intersection of 62nd street and Evans avenue, in Chicago, Illinois. The case was tried before the court without a jury. Plaintiff filed no brief in this court.

The amount of the judgment is not questioned. The sole controversy relates to the manner in which the collision occurred. From the evidence, which is quite meager, it appears that plaintiff's wife was driving his car in an easterly direction on 62nd street. Defendant was driving north on Evans avenue. The cars collided at the intersection of the two streets. Two witnesses testified for plaintiff. Olaf Magnusson stated that he was walking south on Evans avenue near the corner of 62nd street, and first observed plaintiff's car coming from the west at ten or fifteen miles per hour, and that it was right up to the intersection of the street when he first saw it; that defendant's Buick was proceeding north on Evans avenue at about twenty or thirty miles per hour; that the Buick hit the Nash causing damage to the fenders and running board.

Thomas Murray, another witness, testified that he was

APPEAL FROM

STATE OF ILLINOIS

MUNICIPAL COURT

Appellate

v.

LOUISIANA GREEN

Appellant

OF CHICAGO

200 L.A. 626

Opinion filed March 11, 1931

MR. JUSTICE WATSON delivered the opinion of the court.

This is an appeal from a judgment entered by the Municipal Court of Chicago for \$88.30 in favor of plaintiff for damages sustained to his Nash automobile by reason of a collision with defendant's motor at the intersection of 32nd street and Evans avenue, in Chicago, Illinois. The case was tried before the court without a jury. Plaintiff filed no brief in this court.

The amount of the judgment is not questioned. The sole controversy relates to the manner in which the collision occurred. From the evidence, which is quite meager, it appears that plaintiff's wife was driving the car in an easterly direction on 32nd street. Defendant was driving north on Evans avenue. The cars collided at the intersection of the two streets. Two witnesses testified for plaintiff. One witness stated that he was walking south on Evans avenue near the corner of 32nd street, and first observed plaintiff's car coming from the east at ten or fifteen miles an hour and that it was right up to the intersection of the streets when he first saw it; that defendant's motor was proceeding north on Evans avenue at about twenty or thirty miles an hour; that the motor hit the Nash causing damage to the engine and running board.

Thomas Morley, another witness, testified that he was

driving on 62nd street about twenty feet behind plaintiff's car; that he had to slow up because the Nash slowed up to about twelve miles per hour in front of him; that the Buick was about forty feet from him when he first saw it, going about twenty miles per hour and that after the collision his car was approximately eight feet behind the Nash.

Defendant testified that as she approached 62nd street she slowed down to six or eight miles per hour, looked to her left and right, then proceeded across the intersection, and when about half way across she saw plaintiff's car coming east at about thirty miles per hour; that she made a sharp turn to the right but could not entirely avoid plaintiff's car, which struck hers at a point near the front left fender.

There is thus presented a conflict in the evidence both as to the respective speeds at which the two cars were being driven and the other circumstances which led to the collision. There is no evidence to show whether the place of the accident was a closely built up business or residence section, nor that defendant could have avoided the collision by the exercise of due care. The record merely discloses that each automobile proceeded on its way until the collision occurred. According to the undisputed testimony, however, it appears that defendant had the right of way. (Sec. 33, Par. 34, Chap. 95a Ill. Rev. Stat.) Defendant in her affidavit of merits pleaded the statute in general terms, and the court's attention was called to the fact that defendant relied on the statute. While it is true that having the right of way did not relieve defendant from exercising due care and caution at the intersection, it imposed upon plaintiff's wife approaching the intersection the duty to sufficiently check her speed or stop so as to allow defendant, having the right of way, to

driving on 68th street about twenty feet behind Plaintiff's car; that he had to slow up because the truck slowed up to about twelve miles per hour in front of him; that the truck was about forty feet from him when he first saw it, going about twenty miles per hour and that after the collision his car was approximately eight feet behind the truck.

Defendant testified that as she approached 68th street she slowed down to six or eight miles per hour, looked to her left and right, then proceeded across the intersection, and then about half way across she saw Plaintiff's car coming east at about thirty miles per hour; that she made a sharp turn to the right but could not entirely avoid Plaintiff's car, which struck hers at a point near the front left fender. There is thus presented a conflict in the evidence

both as to the respective speeds at which the two cars were being driven and the other circumstances which led to the collision. There is no evidence to show whether the place of the accident was a closely built up business or residential section, nor that defendant could have avoided the collision by the exercise of due care. The record merely discloses that each automobile proceeded on its way until the collision occurred. According to the undisputed testimony, however, it appears that defendant had the right of way. (Sec. 57, Chap. 34, Chap. 36a Ill. Rev. Stat.) Defendant in her affidavit of Petition pleaded the statute in general terms, and the court's attention was called to the fact that defendant relied on the statute. While it is true that having the right of way did not relieve her from exercising due care and caution at the intersection, it imposed upon Plaintiff's wife approaching the intersection the duty to sufficiently check her speed or stop so as to allow defendant, having the right of way, to

pass in front of her car. It was so held in Partridge v. Eberstein, 225 Ill. App. 209, Johnson v. Duke, 247 Ill. App. 372; Fisher v. Johnson, 238 Ill. App. 25, and Singer v. Cross, 257 Ill. App. 41. In Lenartz v. Funk, 224 Ill. App. 180, it was held that the failure of a driver approaching an intersection, not having the right of way, to sufficiently check the speed of his car so as to allow the other car, having the right of way, to pass constituted the proximate cause of the collision. The court said that "it was the duty of the driver of the other car approaching the intersection 'to then stop it, or sufficiently check its speed, so as to allow plaintiff's car to pass in front of it.'" It would seem that if Murray following twenty feet behind plaintiff's car could from his rear position see defendant's car forty feet before it reached the intersection, plaintiff's wife driving in her car and being right up to the intersection, as Magnusson testified, must have observed the approaching Buick at a greater distance; and if she was driving at twelve miles per hour, she could undoubtedly have come to a stop and allowed defendant to pass. Under the authorities it was her duty to do so and her failure to accept the responsibility imposed upon her under the statute was in our opinion the proximate cause of the collision. Furthermore the undisputed evidence shows that defendant in an effort to avoid plaintiff's on-coming car made a sharp turn to the right. The record discloses no evidence that plaintiff's wife tried in any way to avoid the collision. Under the circumstances we believe that plaintiff failed to show a violation of law or negligence on the part of defendant, and did not by a preponderance of the evidence, as disclosed by the record, sustain the allegations of her statement of claim. The judgment of the trial court will, therefore, be reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J., and HEBEL, J. CONCUR.

34342

JULIUS D'ORIO, doing business as
ADVERTOSHARE COMPANY,

Appellant,

v.

NICK CATALANO,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 623²

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago to recover the purchase price of certain Advertoshare checker boards sold by plaintiff to defendant, in the sum of \$90. The case was tried before the court without a jury. There was a finding for defendant and judgment entered accordingly. This appeal is prosecuted to reverse that judgment.

The court heard the cause upon a stipulation of facts, which, briefly stated, disclose that plaintiff is an expert checker player and the owner and holder of a patent covering a combination checker board and punch board printed on pressed paper; that he sold a quantity of these devices to defendant for which the latter agreed to pay the sum of \$90; that each of the holes in the punch board contains a slip of paper stating a problem in checkers and that the object of the game is to solve the problem in a solitary game of checkers by pitting one's skill against the predetermined moves contained on the slip. When used for commercial purposes customers are required to pay ten cents for each slip and prizes may be awarded for various degrees of skill shown in solving the problems presented.

Upon findings of fact and law submitted by plaintiff the trial court held in effect that the boards in question were gambling devices in violation of various provisions of the criminal code and ordinances of the City of Chicago, and that the sale having

JULIUS D'ORIO, doing business as
 ADVERTISING COMPANY
 Appellant,
 v.
 MICHAEL S. SUTHERLAND,
 Appellee.

Opinion filed March 11, 1931

MR. JUSTICE BRIDGES delivered the opinion of the court.
 Plaintiff brought suit in the Municipal Court of
 Chicago to recover the purchase price of certain advertising
 checker boards sold by plaintiff to defendant, in the sum of \$50.
 The case was tried before the court without a jury. There was a
 finding for defendant and judgment entered accordingly. This appeal
 is presented to reverse that judgment.

The court heard the case upon a stipulation of facts,
 which, briefly stated, discloses that plaintiff is an expert checker
 player and the owner and holder of a patent covering a combination
 checker board and punch board printed on pressed paper; that he
 sold a quantity of these devices to defendant for which the latter
 agreed to pay the sum of \$50; that each of the holes in the punch
 board contains a slip of paper stating a problem in checkers and
 that the object of the game is to solve the problem in a satisfactory
 game of checkers by fitting one's skill against the predetermined
 moves contained on the slip. These used for commercial purposes
 customers are required to pay ten cents for each slip and other
 may be wanted for various degrees of skill shown in solving the
 problems presented.

Upon findings of fact and law submitted by plaintiff
 the trial court held in effect that the boards in question were
 gambling devices in violation of various provisions of the criminal
 code and ordinances of the City of Chicago, and that the said having

taken place in the City of Chicago and the State of Illinois, the plaintiff was not entitled to recover the purchase price.

The fact that the boards sold to defendant might be used for an illegal purpose cannot of itself make the sale illegal and void. It was so held in Lipault v. Iowa Novelty Co., 204 N. W. 252, where the court said:

"That much merchandise sold on the market and a subject of illegitimate commerce, can be used for gambling purposes, is to be conceded, and where the merchandise has a legitimate use as well as a gambling use, before the purchaser can refuse payment he must, among other things, prove that the seller knew it was to be used for unlawful purposes."

The stipulated facts upon which the case was presented to the court do not indicate that plaintiff had knowledge of the use to which defendant expected to put these boards, nor is there any evidence or statement of record indicating the character of defendant's business, or that defendant was engaged in a business in connection with which these boards might be used unlawfully. If, for instance, the merchandise was purchased by defendant for the purpose of resale to individuals who might employ the boards as tests of skill to solve the checker problems contained on slips in the punch board, the use would be legitimate. On the other hand, it may well be that they were intended for gambling or games of chance, if the device and plan can be said to constitute a gambling device, but in the absence of evidence to show such intent and knowledge thereof by the seller, we cannot indulge in the presumption. The judgment of the trial court will therefore be reversed with a finding of facts and judgment entered here in favor of plaintiff for the sum of \$90 and the costs of suit.

REVERSED WITH FINDING OF FACTS AND
JUDGMENT HERE.

WILSON, P.J. AND NEBEL, J. CONCUR.

FINDING OF FACTS.

We find no evidence that the merchandise sold by plaintiff to defendant was to be used for an unlawful purpose, and the sale and price being admitted by stipulation, there is due plaintiff the sum of \$90 together with the costs of suit.

taken place in the City of Chicago and the State of Illinois, the plaintiff was not entitled to recover the purchase price. The fact that the boards sold to defendant might be used for an illegal purpose cannot of itself make the sale illegal and void. It was so held in United v. John Kewley Co., 204 N. W.

232, where the court said:

"That such merchandise sold on the market and a subject of legitimate commerce, can be used for gambling purposes, is to be condoned, and where the merchandise has a legitimate use as well as a gambling use, before the purchaser can refuse payment he must, among other things, prove that the seller knew it was to be used for unlawful purposes."

The stipulated facts upon which the case was presented to the court do not indicate that plaintiff had knowledge of the use to which defendant expected to put these boards, nor is there any evidence or statement of record indicating the character of defendant's business, or that defendant was engaged in a business in connection with which these boards might be used unlawfully. It, for instance, the merchandise was purchased by defendant for the purpose of resale to individuals who might employ the boards as tools of skill to solve the checker problem contained on slips in the punch board, the use would be legitimate. On the other hand, it may well be that they were intended for gambling or games of chance, if the device and plan can be said to constitute a gambling device, but in the absence of evidence to show such intent and knowledge thereof by the seller, we cannot indulge in the presumption. The judgment of the trial court will therefore be reversed with a finding of facts and judgment entered here in favor of plaintiff for the sum of \$200 and the costs of suit.

REVEREND WITH FINDING OF FACTS AND
JUDGMENT HERE.

WISOR, J. J. AND HENRY, J. CONCUR.

FINDING OF FACTS.

We find no evidence that the merchandise sold by plaintiff to defendant was to be used for an unlawful purpose, and the sale and price being admitted by stipulation, there is due plaintiff the sum of \$200 together with the costs of suit.

34367

CARL E. PERSON,

Appellee,

v.

CITY STATE INVESTMENT COMPANY,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 620³

MR. JUSTICE FRIEND delivered the opinion of the court.
Opinion filed March 11, 1931
Plaintiff brought his action in the Municipal Court of

Chicago on a quantum meruit for services rendered as an attorney of record for defendant in some nineteen cases in the Municipal Court, ten of which involved confessions on notes and leases. The amount claimed was \$620, for which the court entered judgment in favor of plaintiff.

The defense interposed was that defendant did not retain plaintiff to perform services, but that he was employed by the trustees of the Cooperative Society of America, who control the defendant company, and that plaintiff was employed on a salary basis and was paid a fixed sum for his services.

It is conceded that plaintiff rendered the legal services sued on, and since the reasonableness of his fees is not raised by the pleadings or evidence nor assigned as error, we shall not consider that question (Pennsylvania Co. v. Conlon, 101 Ill. 93).

The sole question is whether plaintiff's employment by the Cooperative Society of America, a common law trust controlling the defendant and various other companies, included legal services rendered by plaintiff for the defendant. Upon this question the testimony is rather vague and conflicting.

Plaintiff was engaged by Seymour Stedman, one of the trustees of the Cooperative Society, in 1923, prior to plaintiff's

DARL E. PETERSON,

Appellee,

v.

CITY STATE INVESTMENT COMPANY,
a Corporation,

Appellant.

APPEAL FROM

NOVEMBER 1931

IN DISTRICT

MR. JUSTICE FRANK delivered the opinion of the court.
Opinion filed March 11, 1932
Plaintiff brought his action in the District Court of

Chicago on a quantum meruit for services rendered as an attorney

of record for defendant in some nineteen cases in the Municipal
Court, ten of which involved convictions on bonds and fines; the
amount claimed was \$250, for which the court entered judgment in
favor of plaintiff.

The defendant interposed that defendant did not retain
plaintiff to perform services, but that he was employed by the
trustee of the Cooperative Society of America, who control the
defendant company, and that plaintiff was employed on a salary
basis and was paid a fixed sum for his services.

It is conceded that plaintiff rendered the legal services
sued on, and since the reasonableness of his fees is not raised by
the findings or evidence not assigned as error, we shall not
consider that question (*Superior v. City of Chicago*, 101 Ill. 93).

The sole question is whether plaintiff's employment by
the Cooperative Society of America, a common law trust controlling
the defendant and various other companies, included legal services
rendered by plaintiff for the defendant. Under this question the
testimony is rather vague and conflicting.

Plaintiff was employed by various bodies, one of the
trustees of the Cooperative Society, in 1928, prior to plaintiff's

admission to the bar. Mr. Stedman testified that the Society either owned or controlled several concerns, including defendant, and that plaintiff was employed to do work for all of them at a fixed salary of \$30 per week, which was subsequently increased. Plaintiff's duties were not clearly defined according to the witness' testimony, but he stated in substance that plaintiff rendered varied services for the defendant company when called upon and that all of his work was included in the weekly salary paid to him.

Edward G. Kesler, also a trustee of the Cooperative Society of America from 1923 to 1927, and president of the defendant company, testified that plaintiff had rendered varied services for the Society and its subsidiaries, including the defendant, and that all such work was included in the terms of his employment and covered by his weekly salary; that no claims were made by plaintiff for legal or other services until January 1930, when a bill for \$620 was presented for the fees sued on; that Kesler then told the plaintiff he "would have no objection to your going after these people (meaning the judgment debtors against whom plaintiff had obtained judgments which included attorney's fees fixed by the court) and collecting those fees from them; but as far as the City State Investment Company is concerned we can't recognize any claim for services because you were paid."

Plaintiff testified that he was employed by Seymour Stedman; that his duties were those of purchasing agent for the Trust and to look after mailing lists, typewriting and printing; that his salary at the beginning was fixed at \$30 per week and subsequently raised to \$70; that the defendant company did not come into existence until some time after his employment; that he never attended to any legal matters for the Society and was not engaged for that purpose; that he had no conversation with any of the trustees with reference to future legal services to be performed

admission to the bar. Mr. Steadman testified that the Society either owned or controlled several concerns, including defendant, and that plaintiff was employed to do work for all of them at a fixed salary of \$30 per week, which was subsequently increased. Plaintiff's duties were not clearly defined according to the witness' testimony, but he stated in substance that plaintiff rendered varied services for the defendant company when called upon and that all of his work was included in the weekly salary paid to him.

Edward G. Keeler, also a trustee of the Cooperative Society of America from 1937 to 1939, and president of the defendant company, testified that plaintiff had rendered varied services for the Society and its subsidiaries, including the defendant, and that all such work was included in the terms of his employment and covered by his weekly salary; that no claims were made by plaintiff for legal or other services until January 1939, when a bill for \$630 was presented for the fees owed; that Keeler then told the plaintiff he "would have no objection to your going after these people (meaning the judgment debtors against whom plaintiff had obtained judgments which included attorney's fees fixed by the court) and collecting these fees from them; but as far as the City State Investment Company is concerned we can't recognize any claim for services because you were paid."

Plaintiff testified that he was employed by Steadman; that his duties were those of purchasing agent for the trust and to look after mailing lists, typewriting and printing; that his salary at the beginning was fixed at \$30 per week and subsequently raised to \$70; that the defendant company did not come into existence until some time after his employment; that he never attended to any legal matters for the Society and was not engaged for that purpose; that he had no conversation with any of the trustees with reference to future legal services to be performed

for the defendant; that the legal services sued on were performed at the request of one Williams who had charge of the Kenilworth Building, in which defendant had a beneficial interest, and for which he made leases with tenants in the name of defendant; that after his admission to the bar and while employed by the Society plaintiff was engaged in the practice of law and, among other things, acted in an advisory capacity to the real estate department of the City State Bank, a subsidiary of the Cooperative Society, upon a retainer fee of \$10 per week.

The record does not show just what services were included in plaintiff's employment, nor the specific work done by him for the Cooperative Society. It is fairly clear, however, that he was employed before his admission to the bar and that he was not retained in a legal capacity. Inasmuch as the defendant company did not come into existence until long after he became an employee of the Cooperative Society, it could not have been contemplated at the time of his employment that he should render legal services for a non-existing concern. The fact that he was paid \$10 per week for legal services by one of the subsidiary companies of the Society would seem to negative the contention that his weekly salary was intended to cover services for all the companies. In connection with Kesler's testimony that he would have no objection to plaintiff's collecting fees from the judgment debtors, it should be noted that the record (but not the abstract) shows that Williams settled some off the cases on which plaintiff secured judgment but paid no part thereof to plaintiff, and manifestly if the settlement included the payment of attorney's fees it would be quite unusual for the defendant company to retain fees allowed to plaintiff without attorning to him for any portion thereof.

The defense interposed was of an affirmative nature and it was defendant's burden to prove that the employment was

for the defendant; that the legal services used on were performed at the request of one Williams who had charge of the Hamilton Building, in which defendant had a beneficial interest, and for which he made leases with tenants in the name of defendant; that after his admission to the bar and while employed by the Society plaintiff was engaged in the practice of law and, among other things, acted in an advisory capacity to the real estate department of the City State Bank, a subsidiary of the Cooperative Society, upon a retainer fee of \$10 per week.

The record does not show just what services were included in plaintiff's employment, nor the specific work done by him for the Cooperative Society. It is fairly clear, however, that he was employed before his admission to the bar and that he was not retained in a legal capacity. Inasmuch as the defendant society did not come into existence until long after he became an employee of the Cooperative Society, it could not have been contemplated at the time of his employment that he should render legal services for a non-existing concern. The fact that he was paid \$10 per week for legal services by one of the subsidiary companies of the Society would seem to negative the contention that his weekly salary was intended to cover services for all the companies. In connection with Keeler's testimony that he could have no objection to plaintiff's collecting fees from the defendant company, it should be noted that the record (but not the answer) shows that Williams retained some of the cases on which plaintiff rendered judgment but paid no part thereof to plaintiff, and similarly if the settlement included the payment of attorney's fees it would be quite unusual for the defendant company to retain fees allowed to plaintiff without allowing to him for any portion thereof.

The defense introduced one of an affirmative nature and it was defendant's burden to prove that the employment was

sufficiently broad to cover the legal services sued for. In view of the facts disclosed by the foregoing testimony we believe that defendant failed to sustain this burden, and that the trial court properly found that plaintiff's employment did not embrace legal services rendered for defendant. Therefore plaintiff is entitled to recover the reasonable value of such services, which was found by the court to be \$620.

Defendant cites several cases in support of its contention that plaintiff is not entitled to compensation in addition to his fixed salary. In all of these cases attorneys retained as such were claiming additional attorney's fees for services rendered beyond the scope of their employment. In view of the finding that plaintiff in the instant case was not employed as an attorney and that the legal services sued on were not included in the terms of his employment, we regard these citations as inapplicable. For the reasons stated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

insufficiently based to cover the legal services sued for. In view of the facts disclosed by the foregoing testimony we believe that defendant failed to sustain this burden, and that the trial court properly found that plaintiff's employment did not entitle him to recover the reasonable value of such services, which was found by the court to be \$200.

Defendant cites several cases in support of its contention that plaintiff is not entitled to compensation in addition to his fixed salary. In all of these cases attorneys retained as such were claiming additional attorney's fees for services rendered beyond the scope of their employment. In view of the finding that plaintiff in the instant case was not employed as an attorney and that the legal services sued on were not included in the terms of his employment, we regard these citations as inapplicable. For the reasons stated the judgment of the Municipal Court will be affirmed.

ATTORNEYS.

WILSON, F. J. AND HARRIS, J. CORRESP.

34376

IN THE MATTER OF THE ESTATE OF
SADIE E. FURLONG,

Appellee,

v.

THE FOREMAN TRUST AND SAVINGS
BANK,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

260 I.A. 626⁴

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an appeal by The Foreman Trust and Savings Bank, conservator of the estate of Sadie E. Furlong, an insane person, from an order of the Circuit Court sustaining objections to the final account of the conservator.

The facts disclose that on January 17, 1927, the County Court of Cook County adjudged Sadie E. Furlong to be insane. In lieu of commitment to an insane asylum, the court committed the incompetent to the care of her sister, Minnie Ryan. Thereafter on January 21, 1927, by an order of the Probate Court The Foreman Trust and Savings Bank was named conservator of the incompetent's estate. April 4, 1927, on petition of the conservator the Probate Court authorized the employment of a nurse for the ward for a period not exceeding six months at \$35.00 per week. On May 18, 1927, the court further authorized the conservator to pay \$35.00 per week to Minnie Ryan for board, room and incidentals of the nurse and ward for a period of six months or until the further order of the court. On January 24, 1928, the first report of the conservator was filed showing payments made pursuant to the foregoing orders. On January 5, 1929, the final account of the conservator was filed in the Probate Court and objections thereto were filed by the ward. On January 23, 1929, the hearing on the objections to the final report was referred to a special referee,

IN THE MATTER OF THE ESTATE OF
SADIE E. TURLONG,

Appellee,

v.

THE FOREMAN TRUST AND SAVINGS
BANK,

Appellant.

CIRCUIT COURT

JOHN COUNTY.

A SPECIAL ORDER

Opinion filed March 11, 1931

MR. JUSTICE PRINCE delivered the opinion of the court.

This is an appeal by The Foreman Trust and Savings

Bank, conservator of the estate of Sadie E. Turlong, an insane person, from an order of the Circuit Court sustaining objections to the final account of the conservator.

The facts disclose that on January 17, 1927, the

Circuit Court of Cook County assigned Judge E. Turlong to be

insane. In lieu of commitment to an insane asylum, the court committed the incompetent to the care of her sister, Minnie Ryan. There-

after on January 24, 1927, by an order of the Probate Court The

Foreman Trust and Savings Bank was named conservator of the in-

competent's estate. April 4, 1927, on petition of the conservator

the Probate Court authorized the employment of a nurse for the ward

for a period not exceeding six months at \$25.00 per week. On May

12, 1927, the court further authorized the conservator to pay

\$25.00 per week to Minnie Ryan for board, room and incidentals of

the nurse and ward for a period of six months or until the further

order of the court. On January 24, 1928, the first report of

the conservator was filed showing payments made pursuant to the

foregoing orders. On January 2, 1929, the final account of the

conservator was filed in the Probate Court and objections thereto

were filed by the ward. On January 27, 1929, the hearing on

the objections to the final report was referred to a special referee,

who subsequently filed his report overruling all objections. When the matter came up for hearing before the court upon exceptions filed to the referee's report the gross sum of \$500.00, representing payments made to Minnie Ryan of \$35.00 per week for board, room and incidentals of the ward, was disallowed, the court finding that Minnie Ryan had imposed upon the conservator, and an order was entered that she return said sum, and in the event of her failure so to do, that the conservator be surcharged in its accounts to the extent of \$500.00, and that it be required to account to the estate therefor. From this order the conservator prayed an appeal to the Circuit Court of Cook County. Upon the failure of Minnie Ryan to return the sum of money ordered by the Probate Court, an order was entered adjudging her to be in contempt of court, and from this order Minnie Ryan prosecuted her appeal to the Circuit Court. These two appeals were consolidated in the Circuit Court, the order of the Probate Court as to the conservator was affirmed, and the proceedings against Minnie Ryan were dismissed.

The sole question of fact presented by this appeal is whether the sum of \$35.00 per week paid to Minnie Ryan, pursuant to the order of the Probate Court, was reasonable compensation.

Minnie Ryan testified that Mrs. Furlong was brought to her home from St. Francis Hospital in January, 1927; that she was an invalid, could not walk, and did not know any one; that when she first came to her home a nurse was employed to take care of her, who received \$35.00 per week for nursing services, pursuant to an order of court; that the nurse remained on duty for about nine months and thereafter she, Minnie Ryan, took care of Mrs. Furlong herself; that she gave her the best of foods, care and attention, assisted her about the house, and that she or some other person stayed with her at all times.

who subsequently filed his report overruling all objections. When the matter came up for hearing before the court upon exceptions filed to the referee's report the gross sum of \$800.00, representing payments made to Minnie Ryan of \$25.00 per week for board, room and incidentals of the ward, was disallowed, the court finding that Minnie Ryan had imposed upon the conservator, and an order was entered that she return said sum, and in the event of her failure so to do, that the conservator be reimbursed in the accounts to the extent of \$800.00, and that it be required to account to the estate therefor. From this order the conservator prayed an appeal to the Circuit Court of Cook County. Upon the failure of Minnie Ryan to return the sum of money ordered by the Probate Court, an order was entered adjudging her to be in contempt of court, and from this order Minnie Ryan prosecuted her appeal to the Circuit Court. These two appeals were consolidated in the Circuit Court, the order of the Probate Court as to the conservator was affirmed, and the proceedings against Minnie Ryan were dismissed.

The sole question of fact presented by this appeal is whether the sum of \$25.00 per week paid to Minnie Ryan, pursuant to the order of the Probate Court, was reasonable compensation. Minnie Ryan testified that Mrs. Foxlong was brought to her home from St. Francis Hospital in February, 1917; that she was an invalid, could not walk, and did not know any one; that when she first came to her home a nurse was employed to take care of her, who received \$25.00 per week for nursing services, pursuant to an order of court; that the nurse remained on duty for about nine months and thereafter she, Minnie Ryan, took care of Mrs. Foxlong herself; that she gave her the best of food, care and attention, assisted her about the house, and that she or some other person stayed with her at all times.

Dr. Conroy, who attended the incompetent, testified that she was blind and paralyzed, disoriented and had no control over her bodily functions; that she was in a noisy delirium for part of the time; that she was unable to move about without assistance and needed attention twenty-four hours a day.

Bridget Ryan testified that she is a sister of both Minnie Ryan and Mrs. Furlong, and lived in the house with the former and participated with her in conducting a rooming house; that when the nurse left Minnie Ryan took care of the incompetent and gave her care and attention.

Mrs. Connerty, a niece of Mrs. Furlong and Minnie Ryan, testified that she lived in the house where Mrs. Furlong was being cared for and had an opportunity to observe the attention given her; that Mrs. Furlong was helpless and bedridden; that when the nurse left Minnie Ryan took care of her alone, and that she received the best possible care and attention.

L. B. Smith testified that when Mrs. Furlong came to reside with Minnie Ryan she was paralyzed and unable to walk, had to be carried and fed and needed constant attention.

All of the foregoing witnesses, except the last, testified that in their opinion the sum of \$35.00 per week received by Minnie Ryan was reasonable.

Only two witnesses testified on behalf of the ward. Mrs. Anna Muldoon, a sister of the incompetent, appeared in court in a drunken condition and created such confusion that the court found her in contempt and sentenced her to jail. She testified that the room occupied by Mrs. Furlong was worth only \$5.00 per week; that the incompetent was mistreated by Minnie Ryan; that her food had to be watched because "they did away with my brother - they poisoned him"; that "they did not do anything for Mrs. Furlong -

Dr. Conroy, who attended the incompetent, testified that she was blind and paralyzed, disoriented and had no control over her bodily functions; that she was in a noisy delirium for part of the time; that she was unable to move about without assistance and needed attention twenty-four hours a day.

Bridget Ryan testified that she is a sister of both Minnie Ryan and Mrs. Furlong, and lived in the house with the former and participated with her in conducting a boarding house; that when the nurse left Minnie Ryan took care of the incompetent and gave her care and attention.

Mrs. Connerly, a niece of Mrs. Furlong and Minnie Ryan, testified that she lived in the house where Mrs. Furlong was being cared for and had an opportunity to observe the attention given her; that Mrs. Furlong was helpless and delirious; that when the nurse left Minnie Ryan took care of her alone, and that she received the best possible care and attention.

I. B. Smith testified that when Mrs. Furlong came to reside with Minnie Ryan she was paralyzed and unable to walk, had to be carried and fed and needed constant attention. All of the foregoing witnesses, except the last,

testified that in their opinion the sum of \$25.00 per week received by Minnie Ryan was reasonable.

Only two witnesses testified on behalf of the wife. Mrs. Anne Muldoon, a sister of the incompetent, appeared in court in a drunken condition and created such confusion that the court found her in contempt and sentenced her to jail. She testified that the room occupied by Mrs. Furlong was worth only \$5.00 per week; that the incompetent was mistreated by Minnie Ryan; that her food had to be watched because "they did away with my brother - they poisoned him"; that "they did not do anything for Mrs. Furlong -

she was treated like a dog." It appears from the record that Mrs. Muldoon's testimony was biased, disconnected and unreliable.

Mrs. Furlong testified in her own behalf that she had served as a registered nurse in various hospitals and institutions; that she could not say what the reasonable charge for practical nurses was at the time of the trial, but that it had formerly been \$12.00 to \$15.00 per week; that she was unconscious for about nine months after coming to the home of Minnie Ryan; that she and Miss Ryan were not on friendly terms, having had differences over Mrs. Muldoon's domestic affairs; that she was mistreated by Miss Ryan, but that the latter helped her with baths, took her from her bed to the bathroom, gave her medicine and otherwise assisted her.

Upon this state of the record we believe that the witnesses appearing on behalf of the conservator clearly established the reasonableness of the allowance made to Minnie Ryan for board, room, care and incidentals of the ward.

While it is true that a conservator is required to manage the estate of his ward frugally and without waste, it is also incumbent upon him "to apply the income and profit thereof, so far as the same may be necessary, to the comfort and suitable support of his ward." (Chap. 86, Sec. 17, Ill. Rev. Stat.) It appears from the record that this estate yielded approximately \$250.00 per month, and \$35.00 per week for the care of the ward does not appear to be disproportionate to the income or an unreasonable amount to have been expended for the incompetent's care and maintenance.

The only question of law presented is whether the Probate Court in the exercise of its jurisdiction could, upon a proper showing, at a subsequent term, set aside or modify its order. It is conceded that the court has such power before the conservator

she was treated like a dog." It appears from the record that Mrs. Muldoon's testimony was biased, disconnected and unreliable.

Mrs. Muldoon testified in her own behalf that she had served as a registered nurse in various hospitals and institutions; that she could not say what the reasonable charges for practical nurses was at the time of the trial, but that it had formerly been \$12.00 to \$15.00 per week; that she was unconscious for about nine months after coming to the home of Winnie Ryan; that she and Miss Ryan were not on friendly terms, having had differences over Mrs. Muldoon's domestic affairs; that she was mistreated by Miss Ryan, but that the latter helped her with other, took her from her bed to the bathroom, gave her medicine and otherwise assisted her.

Upon this state of the record we believe that the witnesses appearing on behalf of the conservator clearly established the reasonableness of the allowance made to Minnie Ryan for board, room, care and incidentals of the ward.

While it is true that a conservator is required to manage the estate of his ward lawfully and without waste, it is also incumbent upon him to apply the income and profits thereof, so far as the same may be necessary, to the comfort and suitable support of his ward. (Comp. St. Ind. Rev. Stat.) It appears from the record that this estate yielded approximately \$280.00 per month, and \$35.00 per week for the care of the ward does not appear to be disproportionate to the income or an unreasonable amount to have been expended for the incompetent's care and maintenance.

The only question of law presented is whether the Probate Court in the exercise of its jurisdiction could, upon proper showing, set aside or modify its order. It is conceded that the court has such power before the conservator

has in good faith acted upon the order of the court, and in the exercise of its equitable jurisdiction it may, when fraud is shown in procuring the order, vacate or modify the same at any time. There is, however, no allegation of fraud in this proceeding, nor does the record disclose any evidence of fraud. The conservator was fully justified in believing that the expenditures were reasonable in view of the physical and mental condition of the ward, and should not be charged with \$500.00 expended in good faith and pursuant to the order of court. It was held in Kingsbury v. Powers, 131 Ill. 182, that when a court having jurisdiction to make the order, authorizes a conservator to pay out money, the conservator is entitled to credit therefor, and we regard this doctrine as applicable to the case before us.

For the reasons stated the judgment of the Circuit Court shall be reversed and remanded with instructions to proceed further in accordance with the views herein expressed.

REVERSED AND REMANDED.

WILSON, P.J. AND NEBEL, J. CONCUR.

has in good faith acted upon the order of the court, and in the exercise of its equitable jurisdiction it may, when found it shown in procuring the order, vacate or modify the same at any time. There is, however, no allegation of fraud in this proceeding, nor does the record disclose any evidence of fraud. The commissioner

was fully justified in believing that the expenditures were reasonable in view of the physical and mental condition of the ward, and should not be charged with \$800.00 expended in good faith and pursuant to the order of court. It was held in Alpena v. Alpena

131 Ill. 188, that when a court having jurisdiction to make the order, authorizes a commissioner to pay out money, the commissioner is entitled to credit therefor, and we regard this doctrine as applicable to the case before us.

For the reasons stated the judgment of the Circuit Court will be reversed and remanded with instructions to proceed further in accordance with the views herein expressed.

REVEREND AND HONORABLE

WILSON, P. J. AND HENRY, J. CONCUR.

34387

SAMUEL DORF and EDWARD WOLFSON,
Doing business as DORF PRINTING
CO.,

Appellant,

v.

J. M. BRODY and FRANK RAFFLE,
Doing business as BRODY & RAFFLE
CO.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 626⁵

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago to recover a balance due on account of printing rendered for defendants. Defendants filed their appearance and affidavit of merits, and demanded a trial by jury. When the cause came on for hearing December 4, 1929, the defendants were not represented in court. Thereupon the cause was tried ex parte before the court and a jury, a verdict rendered in favor of plaintiffs assessing damages at the sum of \$632.25, and judgment entered on the verdict. March 22, 1930, counsel for defendants filed his motion and petition, supported by the affidavit of A. A. Rice, an attorney, to vacate the judgment. The court allowed the motion and set the judgment aside. This appeal is prosecuted to reverse the ruling of the court.

Defendants' petition was brought under Section 21 of the Municipal Court Act (Oshill's Ill. Rev. Stat. Chap. 37, Par. 409), which, in substance, provides that after the lapse of thirty days judgments of the Municipal Court "shall not be vacated, set aside or modified, except upon appeal or writ of error or by bill in equity, or by a petition of said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or

34387

SAKURU DOKU and HENRY SODER
Doing business as SAKURU SODA
00.

Appellants.

v.

J. M. BHOY and FRANK HARTLEY,
Doing business as BHOY & HARTLEY
00.

Appellees.

Opinion filed March 11, 1931

MR. JUSTICE TAYLOR delivered the opinion of the court.
Plaintiff brought suit in the Municipal Court of Chicago
to recover a balance due on account of drinks rendered for
defendants. Defendants filed their answer and affidavit of
veritas, and demanded a trial by jury. When the cause came on for
hearing November 4, 1928, the defendants were not represented in
court. Thereupon the cause was tried by judge before the court and
a jury, a verdict rendered in favor of plaintiff's existing charges
at the sum of \$238.38, and judgment entered on the verdict. Motion
for judgment for defendants filed his motion and petition,
supported by the affidavit of A. A. Giese, an attorney, to vacate
the judgment. The court allowed the motion and set the judgment
aside. This appeal is presented to reverse the ruling of the court.
Defendants' petition was brought under section 11 of
the Municipal Court Act (Smith's Ill. Rev. St. 1927, par.
403), which, in substance, provides that after the lapse of thirty
days judgment of the Municipal Court shall not be vacated, set
aside or modified, except upon a proof of error or by bill in
equity, or by a petition of said Municipal Court setting forth
grounds for vacating, setting aside or modifying the same, which
would be sufficient to cause the same to be vacated, set aside or

34387

modified by a bill in equity." The sole question thus presented is whether the petition filed by defendants was sufficient under the provisions of the foregoing statute to justify the court in setting aside the judgment entered more than three months prior thereto.

The petition, after alleging what purports to be a meritorious defense to plaintiffs' claim, alleges, in substance, that petitioner was absent in Europe when the cause was reached for trial on December 4, 1929; that prior to his departure on October 18, 1929, he arranged with A. A. Rice, an attorney, to watch the Municipal Court calendar, and in the event said cause was reached for trial, to request a continuance until March 1, 1930; that on December 4, 1929, Rice was ill and unable to attend to his office duties; that as a result thereof nobody responded on behalf of defendants and judgment was entered against them on an ex parte hearing.

The affidavit of Rice, which is attached to the petition, states that he was requested by petitioner to watch the court calendar and in the event the case came up for trial during petitioner's absence in Europe to request a continuance until after his return; that on December 4, 1929, when the case was reached for trial, affiant was ill, did not attend to his office duties, and was unable to appear in court; that he had no authority to try the case but only to request a continuance thereof; that thereafter on December 7, 1929, when affiant returned to his office, he discovered that the case had been tried on an ex parte hearing and judgment rendered against defendants; that he immediately called the attorneys for plaintiffs, told them of the circumstances and requested a stipulation to vacate the judgment, agreeing to pay the costs of plaintiffs incurred thereby, but that plaintiffs' attorneys refused to so stipulate, whereupon affiant tried to get in touch with defendants but was unable to do so as he did not have their address;

modified by a bill in equity. The sole question thus presented is whether the petition filed by defendants was sufficient under the provisions of the foregoing statute to justify the court in setting aside the judgment entered more than three months after the trial. The petition, after alleging that attempts to be a meritorious defense to plaintiffs' claim, alleged, in substance, that petitioner was absent in Europe when the case was reached for trial on December 4, 1932; that prior to his departure on October 18, 1932, he arranged with A. A. Rice, an attorney, to watch the Municipal Court calendar, and in the event said calendar was reached for trial, to request a continuance until March 1, 1933; that on December 4, 1932, Rice was ill and unable to attend to his office duties; that on a recent instant memory responded on behalf of defendants and judgment was entered against them on an ex parte hearing. The affidavit of Rice, which is attached to the petition, states that he was requested by petitioner to watch the calendar and in the event the case came up for trial during petition-ex's absence in Europe to request a continuance until after his return; that on December 4, 1932, when the case was reached for trial, defendant was ill, did not attend to his office duties, and was unable to appear in court; that he had no authority to try the case but only to request a continuance thereof; that thereafter on December 7, 1932, when defendant returned to his office, he discovered that the case had been tried on an ex parte by the judge and judgment rendered against defendants; that he immediately called the attorneys for plaintiffs, told them of the circumstances and requested a stipulation to vacate the judgment, agreeing to pay the costs of plaintiffs incurred thereby, but that plaintiffs' attorneys refused to do so; that, whereupon defendant tried to get in touch with defendants but was unable to do so as he did not have their address;

that soon thereafter affiant again became ill and was unable to do anything until the return of petitioner.

It is a well settled rule that a judgment will not be set aside after the time fixed by statute for so doing, unless it appears not only that the judgment debtor has a good and meritorious defense, but that the judgment was in no manner caused by any lack of diligence on the part of defendants; and "this is so even when it affirmatively appears that the judgment against the defendants is unjust and inequitable." (American Surety Co. of N. Y. v. Bliss, 214 Ill. App. 463.)

We regard the petition and affidavit as insufficient. Rice learned of the judgment three days after it was rendered, and failing to obtain plaintiffs' stipulation to vacate the same, it was incumbent upon him to present a motion to the court to vacate the judgment within the time fixed by the statute for so doing. There is nothing in the affidavit to show that Rice was prevented by illness from making such a motion. The affidavit merely states that "soon thereafter affiant took ill again", but does not negative the obvious presumption that he had sufficient opportunity, after he learned of the judgment and before he again became ill. to petition the court within the thirty days, during which jurisdiction still existed, to set the judgment aside. Furthermore petitioner is not without fault, because his failure to leave defendants' addresses with Rice made it impossible for Rice to notify defendants so that they might employ other counsel to protect their interests during the absence of petitioner and because of the illness of Rice.

For the reasons stated we are of the opinion that the allegations of the petition and affidavit do not come within the purview of the authorities authorizing courts to vacate judgments beyond the period prescribed by Section 21 of the Municipal Court Act, and that the court erred in assuming to exercise jurisdiction

that soon thereafter affiant again became ill and was unable to do anything until the return of petitioner.

It is a well settled rule that a judgment will not be set aside after the time fixed by statute for so doing, unless it appears not only that the judgment debtor has a good and meritorious defense, but that the judgment was in no manner caused by any lack of diligence on the part of defendant; and this is so even when it affirmatively appears that the judgment against the defendant is unjust and inequitable." (Western Surety Co. of N. Y. v. Hines, 214 Ill. App. 433.)

To regard the petition and affidavit as insufficient. Also learned of the judgment three days after it was rendered, and failing to obtain plaintiff's stipulation to vacate the same, it was incumbent upon him to present a motion to the court to vacate the judgment within the time fixed by the statute for so doing. There is nothing in the affidavit to show that Rice was prevented by illness from making such a motion. The affidavit merely states that "soon thereafter affiant took ill again", but does not negative the obvious presumption that he had sufficient opportunity, after he learned of the judgment and before he again became ill, to petition the court within the thirty days, during which jurisdiction still existed, to set the judgment aside. Furthermore petitioner is not without fault, because his failure to leave defendants' addresses with Rice made it impossible for him to notify defendants so that they might employ other counsel to protect their interests during the absence of petitioner and because of the illness of Rice. For the reasons stated we are of the opinion that the allegations of the petition and affidavit do not come within the purview of the authorities authorizing courts to vacate judgments beyond the period prescribed by Section 31 of the Illinois Court Act, and that the court erred in assuming to exercise jurisdiction

long after the lapse of thirty days. The ruling of the trial court will therefore be reversed, and the cause remanded with directions to expunge the order vacating the judgment of December 4, 1929, and judgment to stand as of the date entered.

REVERSED AND REMANDED
WITH DIRECTIONS.

WILSON, P.J. AND HEBEL, J. CONCUR.

long after the lapse of thirty days. The ruling of the trial court will therefore be reversed, and the cause remanded with directions to expunge the order awaiting the judgment of December 4, 1935, and judgment to stand as of the date entered.

REVEREND AND OBEYED
SIX DIRECTION.

WILSON, P. J. AND REVEREND, J. CONCUR.

34494

HERMAN P. SCHER,

Plaintiff in Error,

v.

FRED BECKLENBERG,

Defendant in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2601 A. C 271

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago on an oral agreement for broker's fees for the sale of real estate. At the close of plaintiff's case the court found the issues against plaintiff and in favor of defendant and entered judgment accordingly. This writ of error is prosecuted to reverse that judgment.

Plaintiff's second amended statement of claim alleges in substance that the defendant employed plaintiff to sell defendant's property for a net price of \$340,000, agreeing to compensate plaintiff with any amount received in excess of said sum; that plaintiff procured a purchaser who was ready, willing and able to purchase defendant's property for the sum of \$345,000, but that defendant refused to proceed with the sale, and that by reason thereof defendant is indebted to plaintiff in the sum of \$5,000.

By his affidavit of merits defendant denies (1) the employment of plaintiff, (2) the agreement to pay a commission, (3) that plaintiff procured a purchaser ready, willing and able to purchase the property in question, and (4) avers that plaintiff was not a licensed real estate broker as required by statute and is thus precluded from recovering any real estate commission. The latter defense was waived by defendant during the trial, and is therefore not in issue.

In addition to the foregoing defenses it is now urged that

HERMAN F. SCHULZ

Plaintiff in Error

FRED BROCKENBACH

Defendant in Error

ERROR TO

MUNICIPAL COURT

200 111 002

Opinion filed March 11, 1931

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.
Plaintiff brought suit in the Municipal Court of Chicago
on an oral agreement for broker's fees for the sale of real estate.
At the close of plaintiff's case the court found the issues against
plaintiff and in favor of defendant and entered judgment accordingly.
This writ of error is presented to reverse that judgment.

Plaintiff's second amended statement of claim alleges

in substance that the defendant employed plaintiff to sell defendant's
property for a net price of \$340,000, agreeing to compensate plain-
tiff with any amount received in excess of said sum; that plaintiff
procured a purchaser who was ready, willing and able to purchase
defendant's property for the sum of \$345,000, but that defendant
refused to proceed with the sale, and that by reason thereof
defendant is indebted to plaintiff in the sum of \$5,000.

By his affidavit of merits defendant denies (1) the
employment of plaintiff; (2) the agreement to pay a commission;
(3) that plaintiff procured a purchaser ready, willing and able to
purchase the property in question, and (4) avers that plaintiff
was not a licensed real estate broker as required by statute and is
therefore precluded from recovering any real estate commission. The
affidavit of merits was sworn by defendant during the trial, and is
therefore not in issue.

In addition to the foregoing defenses it is not urged that

plaintiff's evidence tends to establish fraudulent conduct toward the defendant by reason of plaintiff's attempt to represent both parties in the transaction and to fraudulently obtain a net price agreement that was lower than the amount authorized by plaintiff's principal. This defense is not raised by the affidavit of merits and obviously could not have been considered by the trial court in making its findings. The purpose of requiring an affidavit of merits is to apprise the plaintiff of the defense relied upon and to limit the issues to the defense interposed. (Kadison v. Fortune Bros., 163 Ill. App. 276.) Having failed to make this defense the defendant should not now be permitted to avail himself of that ground as supporting the trial court's judgment. (Spengler v. Kiger, 225 Ill. App. 323.) The sole question presented for decision, therefore, is whether plaintiff's evidence made a prima facie case to support his claim that he was employed by defendant to sell the property in question at a fixed compensation, and that he procured a purchaser ready, willing and able to buy the same.

Upon this question plaintiff adduced competent evidence to show that defendant was the owner of improved property located at 4530-4542 Drexel Boulevard, in the City of Chicago; that in January, 1927, he was negotiating to sell this property to one Joseph Pomper; that the purchaser was to secure a first and second mortgage to be placed on the property with defendant's permission and to give defendant an assignment of rents on the property for two months as part payment of the purchase price; that the foregoing negotiations terminated in an escrow agreement with the Foreman Trust & Savings Bank; that Pomper was represented by one Kleofas Jurgelonis, an attorney, but because of the inability of said Pomper to procure the necessary mortgages and to secure a sufficient amount of cash, the sale was terminated by all parties; that in the latter part of February, 1927, plaintiff informed defendant that he had

plaintiff's evidence tends to establish fraudulent conduct toward the defendant by reason of plaintiff's attempt to represent both parties in the transaction and to fraudulently obtain a net price agreement that was lower than the amount authorized by plaintiff's principal. This defense is not raised by the affidavit of merits and obviously could not have been considered by the trial court in making its findings. The course of requiring an affidavit of merits is to apprise the plaintiff of the defense relied upon and to limit the issues to the defense interposed. (Engel v. Fortuna Bros., 183 Ill. App. 376.) Having failed to make this defense the defendant should not now be permitted to avail himself of that ground as supporting the trial court's judgment. (Spangler v. Rigan, 335 Ill. App. 380.) The sole question presented for decision, therefore, is whether plaintiff's evidence makes a prima facie case to support his claim that he was employed by defendant to sell the property in question at a fixed commission, and that he procured a purchaser ready, willing and able to pay the same.

Upon this question plaintiff adduced competent evidence to show that defendant was the owner of improved property located at 4530-4540 Street Boulevard, in the City of Chicago; that in January, 1937, he was negotiating to sell this property to one Joseph Homer; that the purchaser was to secure a first and second mortgage to be placed on the property with defendant's permission and to give defendant an assignment of rents on the property for two months as part payment of the purchase price; that the foregoing negotiations terminated in an earnest agreement with the Foreman Trust & Savings Bank; that Homer was represented by one E. J. Longoria, an attorney, but because of the inability of said Homer to procure the necessary mortgages and to secure a sufficient amount of cash the sale was terminated by all parties; that in the latter part of February, 1937, plaintiff informed defendant that he had

a prospective purchaser for the property and was advised that the premises were still for sale; that defendant authorized plaintiff to procure a purchaser and agreed to pay him as his commission for services any amount in excess of \$340,000; that plaintiff then communicated with Jurgelonis, who still represented Pomper; that plaintiff and Jurgelonis made several visits to the defendant and negotiated for the sale of the property to Pomper; that they advised defendant that Pomper was the prospective purchaser, and that as a result of these negotiations the following terms were agreed upon; Pomper was to pay \$345,000 for the property; he was to secure a first mortgage for \$270,000 and a second mortgage for \$80,000, which were to be placed on the property with defendant's permission; that between March and May, 1927, Pomper made application for the first and second mortgages required, through A. M. Krensky & Bros. and Hamburger & Co., who agreed, respectively, to make loans on the first and second mortgages in the sums hereinbefore stated; that when all details for the purchase of the property were complete and the defendant was informed that Pomper was ready to consummate the transaction, defendant informed Jurgelonis and Pomper that he had changed his mind and refused and failed to consummate the transaction; that later defendant conveyed title to the property to his secretary, Mildred Higgins, and without disclosing the fact to any of the parties concerned, applied for and took over the prospective mortgages which had been arranged for on behalf of Pomper. Defendant was called under Section 33 of the Municipal Court Act, and asked the following question:

"Mr. Becklenberg, tell the court what conversation you had with Mr. Scher in June, 1927?"

to which he replied:

"Mr. Scher came to the office and asked me if this property at 4530 to 43 Drexel Boulevard was for sale and I said yes and I says if you sell this property I will pay you a commission. He said all right. He said I think I can sell it."

"Mr. Tolson came to the office and asked me if this property at 4520 Le Breton Boulevard was for sale and I said yes and I says if you sell this property I will pay you a commission. He said all right. He said I think I can sell it."

to which he replied:

"Mr. Weinberger, tell the court what conversation you had with Mr. Sobor in June, 1937?"

Court said, and asked the following question:

Temper. Defendant was called under section 17 of the Municipal Prospective mortgages which had been arranged for on behalf of to any of the parties concerned, applied for and took over the transaction; that later defendant conveyed title to the property had changed his mind and refused and failed to consummate the transaction, defendant informed Jurgenia and Temper that he and the defendant was informed that Temper was ready to consummate that when all details for the purchase of the property were complete the first and second mortgages in the same parcel were stated; and Hamburger & Co., who acted, respectively, to make loans on first and second mortgages received, through A. M. Kennedy & Sons, that between Sobor and say, 1937, Temper made application for the which were to be placed on the property with defendant's permission; a first mortgage for \$20,000 and a second mortgage for \$20,000, upon; Temper was to pay \$246,000 for the property; he was to secure a result of these negotiations the following terms were agreed defendant that Temper was the prospective purchaser, and that as negotiated for the sale of the property to Temper; that they advised plaintiff and Jurgenia made several visits to the defendant and communicated with Jurgenia, who still represented Temper; that services any amount in excess of \$40,000; that plaintiff then to procure a purchaser and agreed to pay him as his commission for promise were still for sale; that defendant authorized plaintiff a prospective purchaser for the property and was advised that the

Later when counsel for plaintiff asked what was said as to commissions other than related, the defendant answered, "regular commissions".

Taken in the light most favorable to plaintiff with all reasonable intendments, this evidence unexplained and uncontradicted constituted plaintiff's prima facie case upon the essential issues formed by the pleadings. It established the employment of plaintiff, the agreement of defendant to pay commissions, and the failure of defendant to accept the purchaser procured by plaintiff, who was ready, willing and able to buy the property.

It is urged by defendant, however, that the evidence adduced proves that plaintiff was not the procuring cause. Defendant contends that Scher was attorney for one Furstonburg, the father-in-law of Pomper, and that Furstonburg advised Pomper to induce plaintiff to reopen negotiations for the purchase of the property, as a result of which the purchaser procured plaintiff to represent him, and that therefore plaintiff was not the efficient and procuring cause of the proposed sale. Inasmuch as the original transaction between Pomper and defendant had completely terminated and both parties had withdrawn from the transaction, we believe it was through plaintiff that negotiations were revived, and the mere fact that the purchaser procured was one who had prior thereto negotiated with defendant does not make plaintiff any less the procuring cause of the sale. So far as the defendant was concerned plaintiff brought to him a ready, willing and able buyer upon satisfactory terms, and was the efficient cause of bringing the transaction to the point where it could have been consummated but for defendant's refusal to proceed with the sale.

Under the pleadings in this case and upon the evidence adduced we are of the opinion that plaintiff made a prima facie case and the court should have required the defendant to proceed with his defense as set forth in the affidavit of merits, and to determine

Later when counsel for plaintiff asked what was said as to commissions other than related, the defendant answered, "regular commissions".

Taken in the light most favorable to plaintiff with all reasonable inferences, this evidence unexplained and uncontradicted constituted plaintiff's prima facie case upon the essential issues formed by the pleadings. It established the employment of plaintiff, the agreement of defendant to pay commissions, and the failure of defendant to accept the purchaser procured by plaintiff, who was ready, willing and able to buy the property.

It is urged by defendant, however, that the evidence adduced proves that plaintiff was not the procuring cause. Defendant contends that Cohen was attorney for one Rosenbaum, the father-in-law of Pomper, and that Rosenbaum advised Cohen to induce plaintiff to reopen negotiations for the purchase of the property, as a result of which the purchaser procured plaintiff to represent him, and that therefore plaintiff was not the efficient and procuring cause of the proposed sale. Inasmuch as the original transaction between Pomper and defendant had completely terminated and both parties had withdrawn from the transaction, we believe it was through plaintiff that negotiations were revived, and the mere fact that the purchaser procured was one who had prior thereto negotiated with defendant does not make plaintiff any less the procuring cause of the sale. So far as the defendant was concerned plaintiff brought to him a ready, willing and able buyer upon satisfactory terms, and was the efficient cause of bringing the transaction to the point where it could have been consummated but for defendant's refusal to proceed with the sale.

Under the pleadings in this case and upon the evidence adduced we are of the opinion that plaintiff made a prima facie case and the court should have required the defendant to proceed with his defense as set forth in the affidavit of merits, and to determine

the issues upon the whole evidence.

For the reasons stated the judgment will be reversed
and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND HESEL, J. CONCUR.

- 8 -

the issues upon the whole evidence.

For the reasons stated the judgment will be reversed

and the case remanded.

REVERSED AND REMANDED.

WILSON, P. J. AND BREWER, J. CONCUR.

34135

GEORGE T. HAGSTROM,

Appellee,

v.

HARRY GROSS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 627²

Opinion filed March 11, 1930

MR. JUSTICE HEBEL delivered the opinion of the court.

The trial court after a hearing, entered a judgment in favor of the plaintiff and against the defendant for the sum of \$925, from which judgment the defendant appeals.

From the record it appears that the plaintiff did not file his appearance, and of course we are not aided by a brief in his behalf.

The action is based upon a contract, which was offered in evidence and is as follows:

"October 13, 1928

"To Jones & Hagstrom, 35 E. Wacker Drive, Chicago, Ill.

For and in consideration of One Dollar (\$1.00), the receipt of which is acknowledged, I hereby appoint you exclusive agent to make sale of real property herein described as attached, for the price of \$22,500.00 on the following terms: \$10,000.00 cash and \$4500.00 secured by Notes for 24 months at Six Per cent (6%), and you are hereby authorized to accept a deposit to be applied on the purchase price, and to execute a binding contract for sale on my behalf.

In case the above property is sold or disposed of within the time specified, I agree that you shall have and may retain from the proceeds arising from such sale, Five Percent (5%) commission on the above price; and * * * percent of all of the consideration for which said property is sold, over and above price above specified, and in case said property is sold within said time either through you or any other person, then in that case I promise to pay you Five percent (5%) on the whole amount for which said property may be sold.

This contract to continue until November 13, 1928.

Harry P. Gross."

It appears from the evidence that the defendant and his wife, Josephine Gross, conveyed the premises described in the contract, to Paul Leavitt and Adolph Mendelovitz, on the

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

2001 A. 627

Appellant.

Opinion filed March 11, 1932

MR. JUSTICE BREWER delivered the opinion of the court.

The trial court after a hearing, entered a judgment in favor of the plaintiff and against the defendant for the sum of \$252, from which judgment the defendant appeals.

From the record it appears that the plaintiff did not file his appearance, and of course we are not aided by a brief in his behalf.

The action is based upon a contract, which was offered in evidence and is as follows:

"October 13, 1928

"To James S. Macgregor, 33 E. Jackson Drive, Chicago, Ill.

"For and in consideration of One Dollar (\$1.00), the receipt of which is acknowledged, I hereby appoint you exclusive agent to make sale of real property herein described as attached, for the price of \$25,000.00 on the following terms: \$10,000.00 cash and \$15,000.00 secured by notes for 24 months at six per cent (6%). and you are hereby authorized to accept a deposit to be applied on the purchase price, and to execute a binding contract for sale on my behalf.

"In case the above property is sold or disposed of within the time specified, I agree that you shall have and may retain from the proceeds arising from such sale, five percent (5%) commission on the above price; and ten percent of all of the consideration for such sale, property is sold, over and above price above specified, and in case said property is sold within said time either through you or any other person, then in such case I promise to pay you five percent (5%) on the whole amount for which said property may be sold.

"This contract to continue until November 13, 1928.

"Harry E. Cross."

It appears from the evidence that the defendant and his wife, Josephine Cross, conveyed the premises described in the contract, to Paul Hewitt and Josephine Hewitt, on the

30th day of November, 1928, subject to a trust deed securing the payment of \$8,000.00; that the plaintiff is a real estate broker; that he met the defendant on October ¹³~~30~~, 1928, and after a conversation, entered into a written agreement, which was signed by the defendant, and is heretofore set forth in full; that shortly thereafter the plaintiff called Adolph Mendelovitz and told him about this particular filling station, and immediately went to the defendant and advised him of this man being in the market for a filling station and submitted it to the defendant. The defendant then made the statement that they (meaning Mendelovitz and his partner Paul Leavitt) had been out to his place, and that they were a couple of "sharp shooters" and were not interested.

It appears also that the plaintiff had written a letter, as well as a postal card, to Mendelovitz, copies of which are in evidence as exhibits, submitting this station, together with other stations, and that he reported to the plaintiff that he was not interested in the stations submitted; that the defendant after the expiration of the time limit fixed by the contract with the plaintiff, came to the plaintiff at an appointed time and stated that he wanted the exclusive contract back; that he had just returned from the Chicago Title & Trust Company, and that he wanted it for the reason that he was going to make a loan.

The defendant testified in his own behalf, in substance, denying that the property was sold within the time specified in the contract; that no customer was procured by the plaintiff for the purchase of the premises during the life of the contract.

The defendant introduced two witnesses, one Adolph Mendelovitz, and the other Paul Leavitt, who were the purchasers

30th day of November, 1938, subject to a trust deed securing the payment of \$8,000.00; that the plaintiff is a real estate broker; that he met the defendant on October 22, 1938, and after a conversation, entered into a written agreement, which was signed by the defendant, and is heretofore set forth in full; that shortly thereafter the plaintiff called Adolph Mendelovitz and told him about this particular listing station and immediately went to the defendant and advised him of this man being in the market for a listing station and submitted it to the defendant. The defendant then made the statement that they (meaning Mendelovitz and his partner Paul Levitz) had been out to his place, and that they were a couple of "sharp shooters" and were not interested.

It appears also that the plaintiff had written a letter, as well as a postal card, to Mendelovitz, copies of which are in evidence as exhibits, submitting this station, together with other stations, and that he reported to the plaintiff that he was not interested in the station submitted; that the defendant after the expiration of the time limit fixed by the contract with the plaintiff, came to the plaintiff at an appointed time and stated that he wanted the exclusive contract back; that he had just returned from the Chicago Title & Trust Company, and that he wanted it for the reason that he was going to make a loan.

The defendant testified in his own behalf, in substance, denying that the property was sold within the time specified in the contract; that no customer was procured by the plaintiff for the purchase of the premises during the life of the contract.

The defendant introduced two witnesses, one Adolph Mendelovitz, and the other Paul Levitz, who were the purchasers

of the property in question, and it appears from their testimony that they entered into an agreement for the purchase of the property in question about the ^{22nd} day of November, 1928, and that the deal was consummated, and the deed executed for the same on November 30, 1928, and was recorded December 1, 1928; and it further appears from their testimony that they never met and did not know the plaintiff, and that the sale was not brought about through his agency. It also appears from the evidence of Adolph Mendelovitz that he did talk to the plaintiff relative to the purchase of this filling station, but that it was after he bought the place, and was about the 22nd or 23rd of November following. He denied that the plaintiff telephoned him on the 13th day of October, 1928, and testified that the first time he heard that the station was for sale was about the 11th or 12th of September, through his partner, who had a Daily Jewish paper, which contained an advertisement offering the premises for sale, which fact was also testified to by Paul Leavitt, who is now part owner of the premises.

The defendant contends that the plaintiff was not entitled to a judgment; that there is no evidence in the record justifying the entry of the judgment for \$925, and that there is no proof whatever as to the amount the property in question was sold for by the defendant. This court in disposing of this case will apply the rule announced by our Supreme Court in the case of Baflner v. Herron, 165 Ill. 342, wherein the court says:

"Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions."

of the property in question, and it appears from their testimony that they entered into an agreement for the purchase of the property in question about the 2nd day of November, 1938, and that the deal was consummated, and the deed executed for the same on November 30, 1938, and was recorded December 1, 1938; and it further appears from their testimony that they never met and did not know the plaintiff, and that the sale was not brought about through his agency. It also appears from the evidence of Ralph Mandelstam that he did talk to the plaintiff relative to the purchase of this Illinois station, but that it was after he bought the place, and was about the 22nd or 23rd of November following. He denied that the plaintiff telephoned him on the 13th day of October, 1938, and testified that the first time he heard that the station was for sale was about the 15th or 16th of September, through his partner, who had a daily Jewish paper, which contained an advertisement offering the premises for sale, which fact was also testified to by Levi Levitt, who is now part owner of the premises.

The defendant contends that the plaintiff was not entitled to a judgment; that there is no evidence in the record justifying the entry of the judgment for \$235, and that there is no proof whatever as to the amount the property in question was sold for by the defendant. This court in disposing of this case will apply the rule announced by our Supreme Court in the case of Hahn v. Hahn, 165 Ill. 242, wherein the court says:

"Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the intermediary of the broker, or through some person employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. It is also true that where the seller commences a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commission."

and that rule was further adhered to in the case of Ridgdon v. More,
Admr. 226 Ill. 382, in these words:

"If plaintiff in error had been employed by the seller to find a purchaser for the property, and through his efforts the owner had been brought into communication with the purchaser, plaintiff in error could not be deprived of his commissions because the owner of the property took up and completed the negotiations himself or through another party."

The question of whether the plaintiff as a broker was the procuring cause of this sale is a controverted one. The trial court was in a better position to pass upon the credibility of the witnesses who appeared in court and testified, and the weight of the evidence, than this court, whose only source of information is the printed record. In the entry of the judgment, the court was justified by the facts in the case and the law announced by the Supreme Court of this State and cited in this opinion. This court will not interfere unless it is clear that the judgment is against the manifest weight of the evidence.

It is to be noted that at the time this contract was entered into by the parties, the defendant did not mention this advertisement, nor was the newspaper containing such advertisement offered in evidence. It is true that there is no evidence in the record disclosing the amount for which the property in question was sold by the defendant. However, the contract with the plaintiff is complete in that the property was to be sold for \$22,500, and that he, the plaintiff, was to receive 5% of this price, which amounts to \$1125; and the defendant is not in a position to complain that the judgment is for less than the amount due.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

WILSON, F.J. AND FRIEND, J. CONCUR.

and that rule was further adhered to in the case of Wilson v. Moore.

Adm. 236 Ill. 582, in these words:

"If plaintiff in error had been employed by the seller to find a purchaser for the property, and through his efforts the owner had been brought into communication with the purchaser, plaintiff in error would not be deprived of his commission because the owner of the property took up and connected the negotiations himself or through another party."

The question of whether the plaintiff is a broker was

the pending issue of this case is a controverted one. The trial court was in a better position to pass upon the credibility of the witnesses who appeared in court and testified, and the weight of the evidence, than this court, whose only source of information is the printed record. In the entry of the judgment, the court was justified by the facts in the case and the law announced by the Supreme Court of this State and cited in this opinion. This court will not interfere unless it is clear that the judgment is against the weight of the evidence. It is to be noted that at the time this contract was entered into by the parties, the defendant did not mention this advertisement, nor was the newspaper containing such advertisement next offered in evidence. It is true that there is no evidence in the record disclosing the amount for which the property in question was sold by the defendant. However, the contract with the plaintiff is complete in that the property was to be sold for \$22,500, and that the plaintiff was to receive one half this price, which amounts to \$11,250; and the defendant is not in a position to complain that the judgment is for less than the amount due.

Finding no reversible error in the record, the

judgment is affirmed.

ATTORNEYS.

WILSON, J. J. AND FRIEND, J. COUNSEL.

34147

ETHEL HILL,

Appellee,

v.

LINCOLN BURIAL ASSOCIATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 627³

Opinion filed March 11, 1931

MR. JUSTICE REBEL delivered the opinion of the court.

This is an action brought by the plaintiff against the defendant, for failure to pay \$400, which was due under the terms of a certain policy, for the burial expenses in the burial of Emmett Hill, her husband, who died on August 7, 1929. The evidence in this case was heard by the court, and it found the issues, and entered a judgment, for the plaintiff, from which the defendant appeals.

The defense to this action was that Emmett Hill in his lifetime was three weeks in arrears in payments at the rate of twenty cents a week.

From the evidence it appears that the plaintiff in the lifetime of Emmett Hill paid the amount in arrears, as well as payments in advance amounting to \$1.00, and received a receipt from a Mr. Ferguson, showing payment on the 15th day of July, 1929; that said receipt was delivered to her attorney, E. P. Blakemore, shortly after her husband's death, and lost in his office.

In answer to the defendant's contention as to the admissibility of certain evidence, this court is of the opinion that the trial court did not err in the admission of the evidence complained of, which established the existence of the receipt

34147
 ETHEL HILL,
 Appellee,
 v.
 LINCOLN BURIAL ASSOCIATION,
 Appellant.
 APPEAL FROM
 MUNICIPAL COURT
 OF CHICAGO.
 300 I.A. 627

Opinion filed March 11, 1931

MR. JUSTICE KESSE delivered the opinion of the court.
 This is an action brought by the plaintiff against
 the defendant, for failure to pay \$400, which was due under
 the terms of a certain policy, for the burial expenses in
 the burial of Emmett Hill, her husband, who died on August 7,
 1929. The evidence in this case was heard by the court, and
 it found the issues, and entered a judgment, for the plaintiff,
 from which the defendant appeals.
 The defense to this action was that Emmett Hill in
 his lifetime was three years in arrears in payments at the rate
 of twenty cents a week.
 From the evidence it appears that the plaintiff in
 the lifetime of Emmett Hill paid the amount in arrears, as
 well as payments in advance amounting to \$1,000, and received
 a receipt from a Mr. Ferguson, showing payment on the 15th day
 of July, 1929; that said receipt was delivered to her attorney,
 E. P. Blakemore, shortly after her husband's death, and lost in
 his office.
 In answer to the defendant's contention as to the
 admissibility of certain evidence, this court is of the opinion
 that the trial court did not err in the admission of the evidence
 contained in, which established the existence of the receipt

and its loss. Upon the testimony of her attorney that he had made a thorough search among the papers and files in his office, and was unable to find the receipt, the court admitted secondary evidence of the contents of the receipt, which evidence also established with reasonable certainty the contents of the document. The evidence of the plaintiff is undisputed, except that Leroy Leslie, manager of defendant association, testified that he did not receive any money within the last two or three weeks prior to the death of Emmett Hill; and the trial court did not err in finding, from a preponderance of the evidence, that the plaintiff had established her case as alleged in the statement of claim.

5 The only contention made by the defendant in this court is that the trial court erred in the admissibility of evidence, which this court has indicated was not erroneous, and there being no reversible error in the record, the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

and its loss. Upon the testimony of her attorney that he had made a thorough search among the papers and files in his office, and was unable to find the receipt, the court admitted secondary evidence of the contents of the receipt, which evidence also

established with reasonable certainty the contents of the document. The evidence of the plaintiff is undisputed, except that Leroy Leslie, manager of defendant association, testified that he did not receive any money within the last two or three weeks prior to the death of Emmett Hill; and the trial court did not err in finding, from a preponderance of the evidence, that the plaintiff had established her case as alleged in the

statement of claim.

The only contention made by the defendant in this court is that the trial court erred in the admissibility of evidence, which this court has indicated was not erroneous, and there being no reversible error in the record, the judgment is affirmed.

ATTORNEYS.

WISDOM, J. L. AND WISDOM, J. L. WISDOM.

34189

MILLARD STATE BANK,
a Corporation,

Appellee,

v.

ANDREW DOLLEJS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 627⁴

Opinion filed March 11, 1931

MR. JUSTICE NEBEL delivered the opinion of the court.

The plaintiff filed an action, and a judgment by confession was entered in the Municipal Court of Chicago against the defendant for \$1155.38, on a promissory note containing a judgment clause. Thereafter the defendant made a motion to vacate the judgment, supported by an affidavit, and after a hearing, the court entered an order giving the defendant leave to defend; the affidavit to stand as an affidavit of merits. Upon the evidence, the court found the issues for the plaintiff and confirmed the judgment, from which the defendant perfects his appeal to this court.

It appears from the evidence that the defendant executed a judgment note for the sum of \$1,000, payable thirty days after date to the plaintiff, and to secure the payment of the note, which contained a collateral agreement, deposited a certain contract for a warranty deed to the property known as No. 3020 South Albany Avenue, Chicago, and that said security was to be sold in case of default, upon the conditions of the agreement; that the promissory note matured and the defendant defaulted in making payment.

There is but one question in this case; did the plaintiff agree to keep the premises insured against loss by fire by obtaining an insurance policy to that effect in an insurance company? The written agreement of the parties is silent on that question.

This question becomes important from the fact that the house on the premises was destroyed by fire on January 13, 1929,

34162

HILLARD STATE BANK,
a corporation,
Appellee,
ANDREW DUBIELS,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

220 I.A. 627

Opinion filed March 11, 1931

MR. JUSTICE HENRY delivered the opinion of the court.
The plaintiff filed an action, and a judgment by con-
cession was entered in the Municipal Court of Chicago against the
defendant for \$118.75, on a promissory note containing a judgment
clause. Thereafter the defendant made a motion to vacate the judg-
ment, supported by an affidavit, and after a hearing, the court
entered an order giving the defendant leave to defend; the affidavit
to stand as an affidavit of merits. Upon the evidence, the court
found the issue for the plaintiff and confirmed the judgment, from
which the defendant petitions his appeal to this court.
It appears from the evidence that the defendant executed
a judgment note for the sum of \$1,000, payable thirty days after
date to the plaintiff, and to secure the payment of the note, which
contained a collateral agreement, deposited a certain contract for
a warranty deed to the property known as No. 3030 South Albany
Avenue, Chicago, and that said security was to be sold in case of
default, upon the conditions of the agreement; that the promissory
note matured and the defendant defaulted in making payment.
There is but one question in this case; did the plain-
tiff agree to keep the premises insured against loss by fire by
obtaining an insurance policy to that effect in an insurance company.
The written agreement of the parties is silent on that question.
This question becomes important from the fact that the
house on the premises was destroyed by fire on January 13, 1929,

and the defendant claims that he was damaged more than the amount of the judgment and costs, for the reason that the plaintiff failed and neglected to keep the premises insured for the amount of the policy that was in force.

The question to be determined is, did the plaintiff agree to terms other than the terms contained in the written agreement in evidence? The facts are disputed upon the question as to what understanding, if any, the parties had regarding a further insurance policy upon the expiration of the policy on the premises. This was a question of fact to be determined by the trial court, and in order to reach a conclusion, it was necessary to pass upon the credibility of the witnesses and to apply to their evidence the rules applicable to test their interest, or lack of it, in the outcome of the case, the fairness of the statements, together with the demeanor of the witnesses and the opportunity of such witnesses for seeing or having knowledge about such things as were testified to, and also upon the weight of the evidence; and the court having done so, we are unable to say, from anything that has been called to our attention, that the manifest weight of the evidence is clearly against the judgment.

The plaintiff is insistent that the trial court was in error in admitting evidence regarding the failure of the plaintiff to further insure the premises and that such admission of evidence was in violation of the rule; that it tended to show a variance in the terms of the written agreement. Upon the record the plaintiff is not in a position to complain. The court weighed the facts in evidence and no doubt considered only the competent evidence in the record and confirmed the judgment, which was in favor of the plaintiff.

We are unable to find that there is reversible error in the record, and the judgment is accordingly affirmed.

AFFIRMED.

WILSON, F.J. AND FRIEND, J. CONCUR.

and the defendant claims that he was damaged more than the amount of the judgment and costs, for the reason that the plaintiff failed and neglected to keep the premises insured for the amount of the policy that was in force.

The question to be determined is, did the plaintiff agree to terms other than the terms contained in the written agreement in evidence? The facts are disputed upon the question as to what understanding, if any, the parties had regarding a further insurance policy upon the expiration of the policy on the premises. This was a question of fact to be determined by the trial court, and in order to reach a conclusion, it was necessary to pass upon the credibility of the witnesses and to apply to their evidence the rules applicable to test their interest, or lack of it, in the outcome of the case, the fairness of the statements, together with the demeanor of the witnesses and the opportunity of such witnesses for seeing or having knowledge about such things as were testified to, and also upon the weight of the evidence; and the court having done so, we are unable to say, from anything that has been called to our attention, that the manifest weight of the evidence is clearly against the judgment. The plaintiff is insistent that the trial court was in error in admitting evidence regarding the failure of the plaintiff to further insure the premises and that such admission of evidence was in violation of the rule; that it tended to show a variance in the terms of the written agreement. Upon the record the plaintiff is not in a position to complain. The court weighed the facts in evidence and no doubt considered only the competent evidence in the record and confirmed the judgment, which was in favor of the plaintiff. We are unable to find that there is reversible error in the record, and the judgment is accordingly affirmed.

APPROVED.

WILSON, J. L. AND THOMAS, J. JUDGES.

34320

IN THE MATTER OF THE PETITION OF
SAMUEL W. MALTZ FOR RELEASE UNDER
THE INSOLVENT DEBTOR'S ACT.

SAMUEL W. MALTZ,

Plaintiff in Error,

v.

CHARLES W. FINDLAY AND ELIZABETH P.
FINDLAY,

Defendants in Error.

WRIT OF ERROR

TO COUNTY COURT

COOK COUNTY.

260 I.A. 623¹

Opinion filed March 11, 1931

MR. JUSTICE NEBEL delivered the opinion of the court.

This proceeding comes before this court on a writ of error to reverse a judgment entered in the County Court on November 8, 1929, dismissing a petition filed by the plaintiff in error, hereinafter called the petitioner, to be released from imprisonment under the Insolvent Debtor's Act, Chap. 72, Sec. 2 Ill. Rev. Statutes, and remanding the petitioner to the custody of the sheriff. The capias ad satisfaciendum issued upon the judgment entered in the Superior Court in July, 1929, is for the sum of \$4494.94, in favor of the defendants in error, hereinafter called respondents, and against the petitioner.

The suit in the Superior Court was an action in trover to recover the value of certain notes and a trust deed on real estate securing the same.

The declaration in that case consists of two counts. The first count charges in substance that the petitioner and the respondents entered into an agreement whereby the respondents turned over certain notes and a trust deed to the petitioner, and the petitioner was to deposit them with the 16th Street Bank for the purpose of obtaining a line of credit for the respondents; that

IN THE MATTER OF THE ESTATE OF
SAMUEL W. WHITE, DECEASED
THE ASSIGNED DEBTOR'S ESTATE

SAMUEL W. WHITE,

Plaintiff in Error,

v.

CHARLES W. FINDLAY AND ELIZABETH P.
FINDLAY,

Defendants in Error.

WITNESSES

TO THE COURT

DOCK COUNTY.

3001A.008

Opinion filed March 11, 1931

MR. JUSTICE WHITE delivered the opinion of the court.

This proceeding comes before this court on a writ of

error to reverse a judgment entered in the County Court on November

8, 1929, dismissing a petition filed by the plaintiff in error,

hereinafter called the petitioner, to be relieved from imprisonment

under the insolvent debtor's act, Chap. 78, Sec. 5 Ill. Rev. Statutes,

and remanding the petitioner to the custody of the sheriff. The

caption of said proceeding issued upon the judgment entered in the

Superior Court in July, 1929, is for the sum of \$4494.94, in favor

of the defendants in error, hereinafter called respondents, and

against the petitioner.

The writ in the Superior Court was an action in trover

to recover the value of certain notes and a small debt on July

estate according to the same.

The decision in that case consisted of two counts. The

first count charges in substance that the petitioner and the

respondents entered into an agreement whereby the respondents turned

over certain notes and a small debt to the petitioner, and the

petitioner was to deposit them with the 18th Street Bank for the

purpose of obtaining a line of credit for the respondents; that

instead of doing so, the petitioner wrongfully converted said notes and trust deed, without the knowledge, concurrence or consent of the respondents, and disposed of the same to his own use by transferring the same to the Greenebaum Sons Bank & Trust Company as part collateral to secure a certain promissory note of the petitioner. The second count is exactly the same as the first count, except that the conversion by the petitioner is alleged to be wrongful, wilful, wanton, malicious and done with the intent of defrauding the respondents.

The case was tried in the Superior Court before a jury, and at the conclusion of the trial, the jury returned the following verdict: "We, the jury, find the defendant guilty, and assess plaintiff's damages at the sum of \$4,494.94." On this verdict a judgment was entered by the court. After the issuance of the capias ad satisfaciendum, the petitioner filed his petition in the County Court to be released under the Insolvent Debtor's Act. The matter came on for hearing before the County Court without a jury, and there was offered in evidence the declaration, verdict and instructions of the Superior Court case. Evidence was presented by the petitioner and the respondents. The evidence of the respondents was that in the month of September, 1922, the petitioner was the president of the then existing 16th Street Bank; that they delivered to him the notes and trust deed in question for the purpose of establishing a line of credit in such bank. The evidence of the petitioner was that at the time he was president of the 16th Street Bank he was also personally engaged in the making of junior mortgages, and that the notes and trust deed in question were delivered to him personally, and not as the president of the 16th Street Bank, for the purpose of making payments on certain other mortgages of the respondents, and to secure him for advances made by him on account of the respondent Charles W. Findlay; that prior to the time and

of the respondent Charles W. Windley; that prior to the time and for the purpose of making payments on certain other mortgages of the Bank he was also personally engaged in the making of junior mortgages, and that the notes and trust deeds in question were delivered to him personally, and not as the president of the 18th Street Bank, and that the notes and trust deeds in question were delivered to him the notes and trust deeds in question for the purpose of establishing a line of credit in each bank. The evidence of the petitioner was that in the month of September, 1933, the petitioner was the president of the then existing 18th Street Bank; that they delivered to him the notes and trust deeds in question for the purpose of establishing a line of credit in each bank. The evidence of the petitioner and the respondents, the evidence of the respondents, the evidence of the respondents of the Superior Court case. Evidence was introduced by and there was offered in evidence the declaration, verdict and judgment entered before the County Court without a jury. The County Court to be released under the Insolvent Debtor's Act. The petitioner filed his petition in the County Court. After the issuance of the judgment was entered by the court. On this verdict a verdict: "We, the jury, find the defendant guilty, and assess damages at the sum of \$4,494.84." On this verdict and at the conclusion of the trial, the jury returned the following verdict: "We, the jury, find the defendant guilty, and assess damages at the sum of \$4,494.84." On this verdict the case was tried in the Superior Court before a jury. The respondents.

after the delivery to the petitioner of the notes and trust deed in question, the respondent Charles W. Fendley, and the petitioner had various dealings together in connection with real estate and real estate mortgages.

The petitioner also claimed that the respondents were indebted to him, and that he had a right to use such notes and trust deed and to pledge the same; that in March, 1923, the 16th Street Bank was closed and all of his records taken away from him, and that he never heard of the matter until sometime in March, 1929, when he was served with a summons in the Superior Court case.

At the conclusion of the hearing in the County Court, the court found against the petitioner, dismissing the petition and remanding the petitioner to the custody of the sheriff.

The petitioner urges as grounds for reversal of the judgment of the County Court that the declaration in the Superior Court was an action in trover, and that malice is not the gist of an action in trover; that the declaration did not under any construction charge malice in the first count thereof; and that it did not charge malice in the second count thereof; that the verdict in the Superior Court case did not find the petitioner guilty of malice, and that the instructions given by the Court in that case practically excluded the element of malice.

This court will first consider the respondents' motion to strike the bill of exceptions from the transcript of the record in this case. We find that a judge, other than the trial judge, within the time allowed for the filing of the same, marked the bill of exceptions as presented. It also appears from the record that pursuant to orders of the court, further extensions were allowed for the signing and filing, and within the time so allowed the trial judge signed the bill of exceptions nunc pro tunc as of the date of its presentment. The point is that the record fails to show any

after the delivery to the petitioner of the notes and trust deed in question, the respondent Charles N. Landis, and the petitioner had various dealings together in connection with real estate and real estate mortgages.

The petitioner also claimed that the respondent was indebted to him, and that he had a right to use such notes and trust deed and to pledge the same; that in March, 1933, the first Street Bank was closed and all of his records taken away from him, and that he never heard of the matter until sometime in March, 1933, when he was served with a summons in the Superior Court case. At the conclusion of the hearing in the County Court, the court found against the petitioner, dismissing the petition and remanding the petitioner to the custody of the sheriff.

The petitioner urges as grounds for reversal of the judgment of the County Court that the declaration in the Superior Court was an action in trover, and that malice is not the gist of an action in trover; that the declaration did not under any construction charge malice in the first count thereof; and that it did not charge malice in the second count thereof; that the verdict in the Superior Court case did not find the petitioner guilty of malice, and that the instructions given by the Court in that case practically excluded the element of malice.

This Court will first consider the respondents' motion to strike the bill of exceptions from the transcript of the record in this case. It finds that a judge, other than the trial judge, within the time allowed for the filing of the same, marked the bill of exceptions as presented. It also appears from the record that pursuant to orders of the court, further extensions were allowed for the signing and filing, and within the time so allowed the trial judge signed the bill of exceptions page 20 page 21 as of the date of its presentation. The point is that the record fails to show any

reasons authorizing any other judge to enter the notation of presentment or to extend the time for filing. It appears affirmatively from the record that the trial court did sign the bill of exceptions and that it was filed within the time extended for such signing and filing; that having been filed within the time so extended, the words in the order approving the bill of exceptions nunc pro tunc as of the date of its presentment and filing may be treated as surplusage. The motion to strike is denied.

The court will now consider this matter on its merits. It must be admitted as the law that in any suit where malice is not the gist of the action, and the debtor is detained by a caus ad satisfaciendum he is entitled upon compliance with the statute to a release under the provisions of the Insolvent Debtor's Act.

The question to be determined is whether malice is the gist of the action and whether the declaration filed in the Superior Court, where judgment after trial was entered, sufficiently alleges malice? The rule is that in an action for conversion of personal property, there is nothing to prevent malice being the gist of the action if properly pleaded, Seney v. Knight, 292 Ill. 206. The question then to be considered is, did the declaration filed in the Superior Court allege in either of the two counts a case where malice was the gist of the action? From an examination of the declaration, it is clear that in one of the counts in respondents' declaration there is an allegation to the effect that the respondents did turn over certain securities to the petitioner and the petitioner was to deposit them with the bank in order to obtain a line of credit, and it is further alleged that the petitioner "wrongfully, wilfully, wantonly and maliciously converted and disposed of the same to his own use by transferring the same," which would imply that the petitioner was guilty of an improper and dishonest motive, and that the wrong was inflicted with evil intent, design and purpose.

persons authorizing any other judge to enter the notation of
presentment or to extend the time for filing. It appears affirm-
atively from the record that the trial court did sign the bill of
exceptions and that it was filed within the time extended for such
signing and filing; that having been filed within the time so ex-
tended, the words in the order approving the bill of exceptions
where no time as of the date of its presentment and filing may be
treated as surplusage. The motion to strike is denied.
The court will now consider this matter on its merits.
It must be admitted as the law that in any suit where malice is not
the gist of the action, and the tort is determined by a certain ad-
ditional element he is entitled upon compliance with the statute to
a release under the provisions of the Insolvency Act.
The question to be determined is whether malice is the
gist of the action and whether the declaration filed in the Superior
Court, where judgment after trial was entered, sufficiently alleges
malice. The rule is that in an action for conversion of personal
property, there is nothing to prevent malice being the gist of the
action if properly pleaded, Agnew v. Agnew, 188 Ill. 308. The
question then to be considered is, did the declaration filed in the
Superior Court allege in either of the two counts a case where
malice was the gist of the action? From an examination of the
declaration, it is clear that in one of the counts in respondents,
declaration there is an allegation to the effect that the respondents
did turn over certain securities to the petitioner and the petitioner
was to deposit them with the bank in order to obtain a line of credit,
and it is further alleged that the petitioner "wrongfully, willfully,
wantonly and maliciously converted and disposed of the same to his
own use by transferring the same," which would imply that the
petitioner was guilty of an improper and dishonest motive, and that
the wrong was inflicted with evil intent, design and purpose.

Jernberg v. Mix, 199 Ill. 254. The law that applies to cases of this character is well stated in Greener v. Brown, 323 Ill. 221, in these words:

"The petition recites that plaintiff in error is in the custody of the sheriff by virtue of said writ and is desirous of releasing his body from arrest by delivering up his property. The sole question controverted in this court, under the pleadings, is whether malice was the gist of the action. The jury in the Circuit Court found plaintiff in error was guilty of conversion. The action was one in tort based on fraudulent conversion. Malice, as that term is used in cases of this character, does not necessarily mean hatred or ill-will, but pertains to wrongs which are inflicted with an evil intent, design or purpose. Such malice may be shown by showing that the guilty party was actuated by dishonest motives with intent to perpetrate an injury. (Seney v. Knight, 292 Ill. 206; Kitson v. Farwell, 132 id. 327; First Nat. Bank of Flora v. Burkett, 101 id. 391.)"

Passing the question that malice may be inferred from the allegation in each count of the declaration, this court will consider the petitioner's contention that when only one of two counts in a declaration charges malice, a general verdict finding defendant guilty is in effect a verdict finding him not guilty of malice. The rule is that when there are several counts and malice is the gist of some and not of others, a judgment is not conclusive on the question of malice. Jernberg v. Mix, supra,

It is apparent from the record that the theory upon which the case was tried in the County Court was that the petitioner by the introduction of evidence tried to bring himself within the provision of the statute that would justify his release. The petitioner, as well as the respondents and their witnesses, testified to the facts in this proceeding, and at the conclusion of the trial the County Court dismissed the petition. It appears from the record in this case, the court did not err.

It is contended by the petitioner that an instruction which ignores the element of intention eliminates thereby the question of malice from consideration by the jury, and in support of this contention he makes reference to two instructions, one which was

Leubner v. Wix, 189 Ill. 354. The law that applies to cases of this character is well stated in Leubner v. Wix, 189 Ill. 351, in these words:

"The petition recites that plaintiff in error is in the custody of the sheriff by virtue of said writ and is desirous of releasing his body from arrest by delivering up his property. The sole question controverted in this court, under the pleadings, is whether or not the plaintiff in error is the owner of the property. The action was brought in error was guilty of conversion. The action was one in tort based on fraudulent conversion. Malice, as that term is used in cases of this character, does not necessarily mean hatred or ill-will, but denotes an wrongful which are initiated with an evil intent, design or purpose. Such malice may be shown by showing that the guilty party was actuated by dishonest motives with intent to perpetrate an injury. (Conroy v. Conroy, 208 Ill. 308; Leubner v. Wix, 189 Ill. 351; Leubner v. Wix, 189 Ill. 351.)"

Passing the question that malice may be inferred from the allegation in each count of the declaration, this court will consider the petition's contention that when only one of two counts in a declaration charges malice, a general verdict finding defendant guilty is in effect a verdict finding him not guilty of malice. The rule is that when there are several counts and malice is the gist of some and not of others, a judgment is not conclusive on the question of malice. (Leubner v. Wix, supra.) It is apparent from the record that the theory upon which the case was tried in the County Court was that the petitioner by the introduction of evidence tried to bring himself within the provision of the statute that would justify his release. The petitioner, as well as the respondents and their witnesses, testified to the facts in this proceeding, and at the conclusion of the trial the County Court dismissed the petition. It appears from the record in this case, the court did not err.

It is contended by the petitioner that an instruction which ignores the element of intent eliminates thereby the question of malice from consideration by the jury, and in support of this contention he makes reference to two instructions, one which says

given and read to the jury by the trial court in the Superior Court, and the other which was marked "refused." The refused instruction was offered by the petitioner in the proceeding in the County Court, and upon objection made by the respondents the trial court refused to admit the instruction in evidence. The petitioner, notwithstanding the ruling of the court, stresses the words used in the refused instruction as an indication that the trial court in the original proceeding withdrew from the consideration of the jury the question of malice. This court cannot consider the refusal to admit this instruction as being before the court. No suggestion is made wherein the County Court erred in such refusal. Upon what theory this court can consider evidence not in the record is not made clear by the petitioner. The court will consider the instruction before us, which is as follows:

"The jury are instructed as a matter of law that when the property of one person comes rightfully into possession of another to be held by him temporarily for some specific purpose and when that is accomplished then to be returned to the owner, if the person so taking possession of the property wilfully sells it or otherwise disposes of it, for his own use and benefit, and so as to deprive the owner or owners of it without his or their consent, this, if proven, will amount to a wrongful conversion of the property and no demand for the possession need be made by the owner before commencing suit to recover the value of the property."

This instruction correctly states the rule as to what amounts to a wrongful conversion, and when a demand for possession of the property by the owner need not be made before commencing suit to recover the value of the property. It does not indicate that the question of malice is withdrawn from the jury, but only announces the rule when a demand is not necessary in a case of this kind, and inasmuch as our attention is not called to an instruction from which we can draw a reasonable inference that the question of malice was withdrawn from the jury, we are unable to agree with the petitioner's contention.

given and read to the jury by the trial court in the Superior Court, and the other which was marked "refused." The refused instruction was offered by the petitioner in the proceeding in the County Court, and upon objection made by the respondents the trial court refused to admit the instruction in evidence. The petitioner, notwithstanding the ruling of the court, stresses the words used in the refused instruction as an indication that the trial court in the original proceeding withdrew from the consideration of the jury the question of malice. This court cannot consider the refusal to admit this instruction as being before the court. No suggestion is made wherein the County Court erred in such refusal. Upon what theory this court can consider evidence not in the record is not made clear by the petitioner. The court will consider the instruction before us, which is as follows:

"The jury are instructed as a matter of law that when the property of one person comes rightfully into possession of another to be held by him temporarily for some specific purpose and when that is accomplished then he is returned to the owner. If the person so taking possession of the property willfully seizes it or otherwise disposes of it for his own use and benefit, and as so to deprive the owner or owners of it without his or their consent, this, if proven, will amount to a wrongful conversion of the property and no demand for the possession need be made by the owner before commencing suit to recover the value of the property."

This instruction correctly states the rule as to what amounts to a wrongful conversion, and when a demand for possession of the property by the owner need not be made before commencing suit to recover the value of the property. It does not indicate that the question of malice is withdrawn from the jury, but only announces the rule when a demand is not necessary in a case of this kind, and inasmuch as our attention is not called to an instruction from which we can draw a reasonable inference that the question of malice was withdrawn from the jury, we are unable to agree with the petitioner's contention.

We are of the opinion that the County Court committed no error in reaching its conclusion, and therefore the judgment of the court dismissing the petition and remanding the petitioner to the custody of the sheriff is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

No one of the opinion that the County Court committed
no error in reaching its conclusion, and therefore the judgment of
the court dissolving the petition and remanding the petitioner to
the custody of the sheriff is affirmed.

AFFIRMED.

WISSE, J. L. AND FRIEND, J. J. JUDGES.

34373

EMIL BURGH and EMMA BURGH,

Appellees,

v.

H. O. STONE & COMPANY,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

260 I.A. 623²

Opinion filed March 11, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

The complainants filed a bill in the Superior Court of Cook County to rescind a contract made with the defendant for the purchase of certain real estate because of fraudulent representations of the defendant's agent, and to recover \$2,182.37 which the complainants had paid to the defendant on account of the purchase price. To this bill the defendant filed an answer and denied that its agent made any fraudulent representations; that the complainants were guilty of laches and that they were estopped from asserting defendant's fraud, if any, by the provision in the contract to the effect that the complainants had read the whole of the contract and agreed that no representation, promise, or agreement not expressed in the contract had been made to induce the complainants to enter into it.

The case was heard by the Chancellor upon the issues joined, and at the close of all the evidence he entered a decree in favor of the complainants rescinding the contract and ordering the defendant to repay to the complainants the sum of \$2,182.37, with interest thereon at the rate of five percent per annum from October 19, 1927, from which the defendant appeals to this court.

From the evidence it appears that during the months of June, July and August of the year 1925, the defendant offered for sale to the public approximately 600 so-called residential and

34373

EMIL BURCH and EMIL BURCH,

Appellants.

v.

H. O. STONE & COMPANY,

Appellees.

APPEAL FROM

STONING COURT

COOK COUNTY.

2001 A. 323

Opinion filed March 11, 1931

MR. JUSTICE HAZEL delivered the opinion of the court.

The complainants filed a bill in the Superior Court of Cook County to rescind a contract made with the defendant for the purchase of certain real estate because of fraudulent representations of the defendant's agent, and to recover \$3,187.37 which the complainants had paid to the defendant on account of the purchase price. To this bill the defendant filed an answer and denied that the agent made any fraudulent representations; that the complainants were guilty of laches and that they were estopped from asserting defendant's fraud, if any, by the provision in the contract to the effect that the complainants had read the whole of the contract and agreed that no representation, promise, or agreement not expressed in the contract had been made to induce the complainants to enter into it.

The case was heard by the Chancellor upon the issues joined, and at the close of all the evidence he entered a decree in favor of the complainants rescinding the contract and ordering the defendant to repay to the complainants the sum of \$3,187.37, with interest thereon at the rate of five percent per annum from October 19, 1927, from which the defendant appeals to this court.

From the evidence it appears that during the months of June, July and August of the year 1926, the defendant offered for sale to the public approximately 600 so-called residential and

business lots in the "Terrace," being H. O. Stone & Company's subdivision in Lake County, Illinois. For some time prior and subsequent to the opening of said subdivision the defendant had weekly meetings of its salesmen at its office in Chicago, Illinois, at which one H. O. Shively, general sales director of the defendant, discussed the "Terrace" subdivision with the salesmen and informed them of certain supposed advantageous features of the subdivision which they might emphasize to prospective customers.

The complainants, who are husband and wife, were first solicited on or about July 27, 1925, to purchase a lot in the "Terrace" by a Miss Grady sales agent and Lawrence Smith, sales manager of the defendant. Smith, in his capacity as sales manager, had attended most of the weekly sales meetings presided over by Shively. After preliminary conversation in the home of the complainants, at that time Smith persuaded the complainants to inspect the subdivision, and accordingly on July 27, 1925, drove them out to the premises. While on the subdivision he represented to the complainants that the entire subdivision, including Lot 5 of Block 25, which he wished them to purchase, was situated within the corporate limits of the Village of Lake Bluff; that H. O. Stone & Company had made arrangements with the Village authorities to install within a short time throughout the entire subdivision, water and gas pipes, sewers, streets, sidewalks and alleys, and that the defendant had agreed with the Village authorities to build certain parks through the property, and that the Chicago, North Shore and Milwaukee Railroad Company had condemned a certain tract of land for the purpose of the erection of a passenger station, which tract of land was within a few hundred feet to the northwest of Lot 5 of Block 25 of the said subdivision; and that from such station passengers would be transported to Chicago within a time period of thirty-five minutes; that the complainants

business lots in the "Terrace," being N. O. Stone & Company's and-
division in Lake County, Illinois. For some time prior and subsequent
to the opening of said subdivision the defendant had weekly meetings
of its salesmen at its office in Chicago, Illinois, at which one N. O.
Shively, general sales director of the defendant, discussed the
"Terrace" subdivision with the salesmen and informed them of certain
supposed advantageous features of the subdivision which they might
emphasize to prospective customers.

The complainants, who are husband and wife, were first
solicited on or about July 27, 1925, to purchase a lot in the "Terrace"
by a Miss Grady sales agent and Lawrence Smith, sales manager of the
defendant. Smith, in his capacity as sales manager, had attended most
of the weekly sales meetings presided over by Shively. After prelimi-
nary conversation in the home of the complainants, at that time
Smith persuaded the complainants to inspect the subdivision, and
accordingly on July 27, 1925, drove them out to the premises. While on
the subdivision he represented to the complainants that the entire sub-
division, including lot 5 of block 35, which he wished them to pur-
chase, was situated within the corporate limits of the Village of
Lake Bluff; that N. O. Stone & Company had made arrangements with the
Village authorities to install within a short time throughout the
entire subdivision, water and gas pipes, sewers, streets, sidewalks
and alleys, and that the defendant had agreed with the Village authori-
ties to build certain parks through the property, and that the
Chicago, North Shore and Milwaukee Railroad Company had condemned
a certain tract of land for the purpose of the erection of a
passenger station, which tract of land was within a few hundred
feet to the northwest of lot 5 of block 35 of the said subdivision;
and that from such station passengers would be transported to Chicago
within a time period of thirty-five minutes; that the complainants

upon such representations being made, and believing same to be true paid Smith while on the premises a deposit on account of the purchase of Lot 5 of Block 25, and on the following Sunday at their home paid the balance of the initial payment and executed a written contract for the purchase of said lot, by the terms of which the complainants agreed to purchase and the defendant agreed to sell the same for the price of \$3,375; that on July 27, 1925, and subsequent thereto, Lot 5 of Block 25, which complainants purchased, was not within the corporate limits of the Village of Lake Bluff, but was several hundred feet west of the corporate limits, and that the defendant had not at any time made any arrangements with the authorities of the Village of Lake Bluff to install in the aforesaid subdivision any water or gas pipes, sewers, streets or alleys, and that the Chicago North Shore & Milwaukee Railroad Company had not on July 27, 1925, or at any other time, condemned or purchased any ground in the northwest corner of the aforesaid subdivision for the erection of a passenger station. The only ground condemned by the Railroad Company in the northwest corner of the subdivision was condemned for its use as a right of way.

It also appears from the evidence that the complainants, without knowing of the falsity of the representations, made payments on their contract until October 19, 1927, amounting to \$2,182.37; that shortly thereafter they went to their attorney, who made an investigation and discovered that not only was the lot outside of the corporate limits of the Village, but also that no legal arrangements had been made with the proper authorities of the Village for the installation of improvements, nor was any land condemned by the Railroad Company for terminal purposes.

It further appears from the evidence that at the time of the trial, the property purchased under this contract was in the same condition as it was in July of 1925 when the complainants were

upon such representations being made, and believing same to be true
paid said while on the premises a deposit on account of the pur-
chase of lot 2 of Block 22, and on the following Sunday at their
home paid the balance of the initial payment and executed a written
contract for the purchase of said lot, by the terms of which the
complainants agreed to purchase and the defendant agreed to sell the
same for the price of \$5,275; that on July 27, 1935, and subsequent
thereto, lot 2 of Block 22, which complainants purchased, was not
within the corporate limits of the Village of Lake Bluff, but was
several hundred feet west of the corporate limits, and that the
defendant had not at any time made any arrangements with the author-
ities of the Village of Lake Bluff to install in the aforesaid
subdivision any water or gas pipes, sewers, streets or alleys, and
that the Chicago North Shore & Milwaukee Railroad Company had not
on July 27, 1935, or at any other time, condemned or purchased any
ground in the northwest corner of the aforesaid subdivision for the
erection of a passenger station. The only station condemned by the
Railroad Company in the northwest corner of the subdivision was
condemned for use as a right of way.

It also appears from the evidence that the complainants,
without knowing of the falsity of the representations, made payments
on their contract until October 12, 1937, amounting to \$2,183.25;
that shortly thereafter they went to their attorney, who made an
investigation and discovered that not only was the lot outside of
the corporate limits of the Village, but also that no legal arrange-
ments had been made with the proper authorities of the Village for
the installation of improvements, nor was any land condemned by
the Railroad Company for railroad purposes.

It further appears from the evidence that at the time of
the trial, the property purchased under this contract was in the
same condition as it was in July of 1935 when the complainants were

induced to purchase the lot.

The point is made that there was a nonjoinder of necessary and indispensable parties as defendants in this case, and therefore the decree is erroneous. In order to pass upon that question it will be necessary to examine the contract. It is an elementary rule that the parties to a contract are to be ascertained from the contents of the document itself. Now what do we find from the contract in this case? We find this language, in part:

"Articles of Agreement, made this 27th day of July, A. D. 1925, at Chicago, Illinois, between M. O. Stone & Company, agent, party of the first part, and Emil Burgh and Emma Burgh, his wife, * * * as party of the second part, WITNESSETH, That if the party of the second part shall first make all the payments and perform the covenants hereinafter mentioned * * * the party of the first part hereby covenants and agrees to obtain conveyance from the Chicago Title & Trust Company, as Trustee under the terms of a certain trust agreement known as Trust No. 14532 and assure to the party of the second part, in fee simple * * * the following described real estate."

It is clear at this point that the defendant did not act in a representative capacity, but did agree that it would upon the payment and performance of the complainants, obtain a conveyance of the real estate from the Chicago Title & Trust Company, trustee, and assure to the complainants in fee simple the title to the real estate described in the contract. It was not necessary for the defendant to have the title to the real estate at the time the contract was signed. Its duty however is clear that when the payment is made it must perform. We find from further examination of this contract that the defendant might pay taxes upon the failure of the complainant to do and that additional sums if paid by the defendant would become due from the complainants. It also appears from the contract that in case of the complainants default, the defendant, at its option, may forfeit the contract, and all payments made on the contract should then be retained by the defendant in liquidation of damages. This indicates that the contract was entered into by the

induced to purchase the lot.

The point is made that there was a misapprehension of necessary and independent parties as defendants in this case, and therefore the decree is erroneous. In order to pass upon that question it will be necessary to examine the contract. It is an elementary rule that the parties to a contract are to be ascertained from the contents of the document itself. Now what do we find from the contract in this case? We find this language, in part:

"Articles of Agreement, made this 27th day of July, A. D. 1928, at Chicago, Illinois, between H. O. Trone & Company, a corporation of the State of Illinois, and Emil Smith and Emma Smith, his wife, * * * as party of the first part, and * * * as party of the second part, * * * the party of the first part hereby covenant, make and perform the covenants hereinafter mentioned * * * the party of the first part hereby covenant and agree to obtain conveyance from the Chicago Title & Trust Company, as trustee under the terms of a certain trust agreement known as Trust No. 14523 and return to the party of the second part, in fee simple * * * the following described real estate."

It is clear at this point that the defendant did not act in a representative capacity, but did agree that it would upon the payment and performance of the complainants, obtain a conveyance of the real estate from the Chicago Title & Trust Company, trustee, and assume to the complainants in fee simple the title to the real estate described in the contract. It was not necessary for the defendant to have the title to the real estate at the time the contract was signed. Its duty however is clear that when the payment is made it must perform. It is clear from further examination of this contract that the defendant might have taken upon the failure of the complainants to do so and that additional sums if paid by the defendant could become due from the complainants. It also appears from the contract that in case of the complainants default, the defendant, at its option, may forfeit the contract, and all payments made on the contract should then be retained by the defendant in liquidation of damages. This indicates that the contract was entered into by the

defendant not as an agent, but as a contracting party deriving benefits from the contract that was entered into by the parties. The fact that the defendant had a further contract with third parties does not help in the solution of the question. The complainants had a right to rely upon the contract as written and hold the defendant responsible under its terms.

In order to do complete justice in this case, it was not necessary for the Chicago Title & Trust Company, as Trustee, or Henry F. Norcott as beneficiary under Trust No. 14534, to be made parties in this proceeding.

It is urged with earnestness by the defendant that the complainants should be denied a right to rescind for the reason that with full knowledge of the facts from July 27, 1925 to May 12, 1928, when the bill was filed, they elected to affirm their contract and are bound by their election. The defendant quotes from the case of Follett v. Brown, 188 Ill. 244, as follows:

"A party who desires to rescind a transaction for fraud, must, upon discovery of the facts, announce his purpose and adhere to it, and cannot be permitted to stand passive and speculative as to whether he will rescind the transaction or waive the fraud as the events of the future may determine it to be more profitable for him."

The facts disclose, however, that the complainants never were in possession of the real estate and that the payments due under the contract were made by them to the defendant; that the only thing that the complainants had was a right of action under the contract. The title to the real estate not being in the complainants and the monies paid to the defendant did not change the status of the parties, and surely no equities have intervened that would justify the court in denying the relief prayed for. There is no evidence in the record that the defendant was injured or was misled by any act of the complainants.

The facts indicate that the first time the complainants

defendant not as an agent, but as a contracting party deriving benefits from the contract that was entered into by the parties. The fact that the defendant had a further contract with third parties does not help in the solution of the question. The complainants had a right to rely upon the contract as written and hold the defendant responsible under its terms.

In order to do complete justice in this case, it was not necessary for the Chicago Title & Trust Company, as Trustee, or Henry F. Norcott as beneficiary under Trust No. 14334, to be made parties in this proceeding.

It is urged with earnestness by the defendant that the complainants should be denied a right to rescind for the reason that with full knowledge of the facts from July 27, 1925 to May 17, 1928, when the bill was filed, they elected to affirm their contract and are bound by their election. The defendant quotes from the case of Pollett v. Brown, 189 Ill. 244, as follows:

"A party who desires to rescind a transaction for fraud, must, upon discovery of the facts, announce his purpose and abjure it, and cannot be permitted to stand passive and speculative as to whether he will rescind the transaction or waive the fraud as the events of the future may determine it to be more profitable for him."

The facts disclose, however, that the complainants never were in possession of the real estate and that the payments due under the contract were made by them to the defendant; that the only thing that the complainants had was a right of action under the contract. The title to the real estate not being in the complainants and the monies paid to the defendant did not change the status of the parties, and surely no equities have intervened that would justify the court in denying the relief prayed for. There is no evidence in the record that the defendant was injured or was misled by any act of the complainants. The facts indicate that the first time the complainants

learned of the falsity of the representations of the defendant was when their attorney, shortly after October 19, 1927, discovered that the lot in question was outside of the corporate limits of the Village of Lake Bluff; that no arrangements had been made with the Village authorities for the installation of improvements, and that no land was condemned for terminal facilities. Shortly thereafter this suit was instituted.

The law is that one seeking to rescind a contract upon the ground of fraud must act promptly. The Chancellor passed on that question in this case, and we are not disposed to disturb the decree upon that ground.

A further contention of the defendant is that there is no evidence in the record of misrepresentations of present existing facts which were material in the making of the agreement.

There is criticism to the effect that the misrepresentation is not supported by any conclusive evidence that the agent of defendant told the complainants that the lot was within the corporate limits of the Village of Lake Bluff.

The rule is that false representations as to the boundaries of land are grounds for rescinding a contract of sale. Higgins et al. v. Bicknell, 82 Ill. 502; Gullett v. Leaverton, et al., 188 Ill. App. 66. From the evidence it appears that the representation made to the complainants as to the location of the lot in the Village of Lake Bluff was fraudulent, and such false representation was knowingly made; was a present material representation; was relied upon by the complainants, and is one of the grounds for relief. Antle & Bro. v. Sexton, et al., 137 Ill. 410. It is suggested, however, that such misrepresentation is one of law. To this we cannot agree for the reasons stated. If the boundaries of a piece of land are pointed out to the prospective purchaser, the seller is bound by such representation if made to induce a purchaser to enter

learned of the falsity of the representations of the defendant was when their attorney, shortly after October 19, 1937, discovered that the lot in question was outside of the corporate limits of the Village of Lake Bluff; that no arrangements had been made with the Village authorities for the installation of improvements, and that no land was condemned for terminal facilities. Shortly thereafter this suit was instituted.

The law is that one seeking to rescind a contract upon the ground of fraud must act promptly. The Chancellor passed on that question in this case, and we are not disposed to disturb the decree upon that ground.

A further contention of the defendant is that there is no evidence in the record of misrepresentations of present existing facts which were material in the making of the agreement.

There is criticism to the effect that the misrepresentation is not supported by any conclusive evidence that the agent of defendant told the complainant that the lot was within the corporate limits of the Village of Lake Bluff.

The rule is that false representations as to the boundaries of land are grounds for rescinding a contract of sale. Antie & Bro. v. Bixford, 33 Ill. 305; Antie v. Bixford, 211 Ill. App. 66. From the evidence it appears that the representation made to the complainant as to the location of the lot in the Village of Lake Bluff was fraudulent, and such false representation was knowingly made; was a present material representation; was relied upon by the complainant, and is one of the grounds for relief.

Antie & Bro. v. Bixford, 33 Ill. 305; Antie v. Bixford, 211 Ill. App. 66. It is contended, however, that such misrepresentation is one of law. To this we cannot agree for the reasons stated. If the boundaries of a piece of land are pointed out to the prospective purchaser, the seller is bound by such representation if made to induce a purchaser to enter

into a contract, whether it was as to the dimensions of the land or its location in a political division such as a village or town, and is a ground for rescission.

Complaint is also made by the defendant that the evidence that the defendant had made arrangements with the village authorities to install in the subdivision within a short time, water and gas pipes, sewers, streets, sidewalks and alleys; and also that the Chicago, North Shore and Milwaukee Railroad had at the time of the representations condemned a certain tract of land for terminal facilities, was not a representation of existing facts. The evidence is conclusive that no agreement or arrangements were made or entered into by the defendant with the Village authorities to install improvements or do the things mentioned, and further that no land was condemned by the railroad for terminal facilities. These representations of existing facts were false when made and known to defendant through the fact that statements made by the general sales director at the meeting of the salesman in line with the representations made to the complainants by its agent. The law is plain, and applying it to the facts in this case as we have discussed them, the trial court was fully justified in finding as it did.

The defendant asserts that the complainants by executing the separate agreement under seal in these words,

"The undersigned has read and understands the whole of the above contract, and now states, and in consideration of the contract agrees, that no representation, promise or agreement not expressed in the contract has been made to induce the undersigned to enter into it.

Emil Burgh (Seal)
Emma Burgh (Seal)"

are estopped to assert that there were any representations made by the defendant's agent other than the representations contained in the contract, and in support of this position cite authorities.

into a contract, whether it was as to the dimensions of the land or its location in a political division such as a village or town, and is a ground for rescission.

Complaint is also made by the defendant that the evidence that the defendant had made arrangements with the village authorities to install in the subdivision within a short time, water and gas pipes, sewers, streets, sidewalks and alleys; and also that the Chicago, North Shore and Milwaukee Railroad had at the time of the representations condemned a certain tract of land for terminal facilities, was not a representation of existing facts. The evidence is conclusive that no agreement or arrangement was made or entered into by the defendant with the Village authorities to install improvements or do the things mentioned, and further that no land was condemned by the railroad for terminal facilities. These representations of existing facts were false when made and known to be false through the fact that statements made by the general sales director at the meeting of the salesman in line with the representations made to the complainants by the agent. The law is plain, and applying it to the facts in this case, no one who has discussed them, the trial court was fully justified in finding as it did.

The defendant asserts that the complainants by executing the separate agreement under seal in these words,

"The undersigned has read and understands the whole of the above contract, and now states, and in consideration of the contract agreed, that no representation, promise or inducement has been made to him to induce him to enter into it."

Sam Hurd (seal)
Edith Hurd (seal)

are supposed to assert that there were any representations made by the defendant's agent other than the representations contained in the contract, and in support of this position the authorities

The action in this case is not upon the contract, but to be relieved from its terms because of false representations and deceit used to induce the complainants to enter into the contract. It is well settled that such an action will lie though the parties may have entered into a written contract and though in such agreement there may be a warranty or stipulation upon the point covered by the misrepresentation. Antle & Bro. v. Sexton, supra. The fact that the agreement is under seal does not militate against the complainants' right of action.

The opinion of the Appellate Court clearly expressed the rule in Miller v. Nydiak, 254 Ill. App. 584, that applies with equal force to the instant case as follows:

"To hold that one who by fraudulent representations procures the signature of another to a contract will be immune from a suit to rescind the same because the contract which itself was obtained by fraud states that no fraudulent representations were made, would paralyze the arm of a court of equity. Such is not the law. Fraud vitiates everything it touches, and a complainant is not precluded by reason of the fact that a defendant who defrauded him succeeded, as a part of the fraud, in getting a written statement that there was no fraud. This might show the skill of the operator and the gullibility of his victim, but a court of justice is not thereby estopped."

We are unable to view the facts and the law in the light of defendant's contention, and have reached the conclusion, for the reasons indicated in this opinion, that the trial court was fully justified in finding as it did. The decree is therefore affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The action in this case is not upon the contract, but to be relieved from its terms because of false representations and deceit used to induce the complainants to enter into the contract. It is well settled that such an action will lie though the parties may have entered into a written contract and though in such agreement there may be a warranty or stipulation upon the point covered by the misrepresentation. Callis & Bro. v. Barker, supra. The fact that the agreement is under seal does not militate against the complainants' right of action.

The opinion of the Appellate Court clearly expressed the rule in Miller v. Exchick, 224 Ill. App. 184, that applies with equal force to the instant case as follows:

"To hold that one who by fraudulent representations procures the signature of another to a contract will be taken from him to rescind the same because the contract which itself was obtained by fraud states that no fraudulent representations were made, would penalize the aim of a court of equity. Such is not the law. Fraud vitiates everything it touches, and a complaint is not rendered by reason of the fact of that a defendant who belittled his accusation, as a part of the fraud, in getting a written statement that there was no fraud. This might show the skill of the operator and the guiltiness of his victim, but a court of justice is not thereby satisfied."

We are unable to view the facts and the law in the light of defendant's contention, and have reached the conclusion, for the reasons indicated in this opinion, that the trial court was fully justified in finding as it did. The decree is therefore affirmed.

REVEREND.

WILSON, J. L. AND BROWN, J. J. CONCUR.

34393

J. L. FRANCIS,

Appellee,

v.

MARSHALL FIELD & CO., a
Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

260 I.A. 628³

Opinion filed March 11, 1934.

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an action of trespass on the case, filed in the Superior Court of Cook County by J. L. Francis, plaintiff, against Marshall Field & Co., a corporation, defendant, for personal injuries.

The case was tried before a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages in the sum of \$8,500. The defendant's motion for a new trial was overruled, and the court entered a judgment on the verdict, from which the defendant appealed.

The declaration consists of five counts. The first count alleges, in substance, that the defendant on the 18th day of June, 1928, owned and operated a large department store in the City of Chicago; that the plaintiff in the exercise of due care and caution for his own safety, went to the store as an invited guest for the purpose of shopping and attending a demonstration in the use of golf balls, golf clubs, etc.; that the defendant was maintaining a large enclosed net in which one of its servants was making a demonstration of the use of golf balls; that the defendant negligently managed, operated and controlled said demonstration, and as a result its then servant carelessly and negligently struck a certain golf ball with a club with great force, causing the said golf ball to slice off

A. L. FRAZIER

J. L. FRAZIER

SUPERIOR COURT

Appellee

DOCK COUNTY

MARSHALL FIELD & CO., INC.

Corporation

Appellant

24332

Opinion filed March 11, 1937

MR. JUSTICE BREWER delivered the opinion of the court.

This is an action of trespass on the case, filed

in the Superior Court of Dock County by J. L. Frazier, plain-

tiff, against Marshall Field & Co., a corporation, defendant,

for personal injuries.

The case was tried before a jury, and a verdict

returned finding the defendant guilty and assessing the plain-

tiff's damages in the sum of \$8,500. The defendant's motion

for a new trial was overruled, and the court entered a judgment

on the verdict, from which the defendant appealed.

The declaration consists of five counts. The first

count alleges, in substance, that the defendant on the 14th day

of June, 1936, owned and operated a large department store in

the City of Chicago; that the plaintiff in the exercise of due

care and caution for his own safety, went to the store as an

invited guest for the purpose of shopping and attending a

demonstration in the use of golf balls, golf clubs, etc.; that

the defendant was maintaining a fence enclosed and in which one

of its servants was making a demonstration of the use of golf

balls; that the defendant negligently managed, operated and

controlled said demonstration, and as a result its then servant

carelessly and negligently struck a certain golf ball with a

club with great force, causing the said golf ball to strike the

and be propelled with great force upon and against the aforementioned net, near which the plaintiff was standing, and the net against which it was driven struck against one of the eyes of the plaintiff, injuring him.

The second count alleges that the defendant carelessly, negligently and improperly managed, operated and controlled its said golf demonstration, and as a result one of its golf balls flew with great force and violence upon and against the face of the plaintiff and struck him violently in the eye, causing injuries.

The third count alleges that the defendant carelessly, negligently and improperly constructed said net surrounding said golf demonstration so that said net was loose, elastic and insecurely fastened off from the public, so that the said net gave way, expanded and flew outward under the propulsion and driving force of a certain golf ball of the defendant which was then and there struck and driven by one of its then servants and agents.

The fourth count is a wanton and malicious count, and the fifth count charges that the defendant negligently failed to furnish the plaintiff with protection against injury, but on the contrary negligently and improperly caused a certain golf ball and the net surrounding said demonstration to be propelled and driven with great force and violence upon and against the face of the plaintiff, injuring him.

It appears from the evidence that the defendant owns and operates a large retail department store in Chicago, and that in the men's store on the fifth floor is the sporting goods department, in which is offered for sale, among other things, golf paraphernalia and supplies.

and be propelled with great force upon and against the store-mentioned net, near which the plaintiff was standing, and the net against which it was driven struck against one of the eyes of the plaintiff, injuring him.

The second count alleges that the defendant carelessly, negligently and improperly managed, operated and controlled its said golf demonstration, and as a result one of its golf balls flew with great force and violence upon and against the face of the plaintiff and struck him violently in the eye, causing injuries.

The third count alleges that the defendant carelessly, negligently and improperly constructed said net surrounding said golf demonstration so that said net was loose, elastic and insecurely fastened off from the public, so that the said net gave way, expanded and flew outward under the propulsion and driving force of a certain golf ball of the defendant which was then and there struck and driven by one of its then servants and agents.

The fourth count is a slander and malicious count, and the fifth count charges that the defendant negligently failed to furnish the plaintiff with protection against injury, but on the contrary negligently and improperly caused a certain golf ball and the net surrounding said demonstration to be propelled and driven with great force and violence upon and against the face of the plaintiff, injuring him.

It appears from the evidence that the defendant owns and operates a large retail department store in Chicago, and that in the men's store on the fifth floor is the sporting goods department, in which is offered for sale, among other things, golf paraphernalia and supplies.

In the month of March, 1928, David Frankel, who represented a New York clothing concern, called upon Eugene Barnhart, who was in charge of the men's store of the defendant, and said to Barnhart that the national open golf championship was to be held in June, 1928; that he, Frankel, thought he could get eight or ten of the leading professionals who would be in the city at that time to perform in the sporting goods department of the defendant. Barnhart asked him how much he would have to pay for such an exhibition, and he replied that he was not positive, but thought the whole thing could be managed for \$800.00, to which Barnhart agreed.

Barnhart put an advertisement in the papers advertising the golf exhibition and caused to be erected the equipment for the exhibition. He was not present when the plaintiff was injured. The exhibition was given in a mesh netting of cords owned and put up by the defendant. It was ten feet wide by twenty feet long and twelve feet high. Around the bottom for a height of thirty-six inches was a wire screening, which was nailed to the floor. The mesh netting was drawn tight and laced to an iron frame, and was also drawn tight and laced to the wire screening at the bottom. After the net was constructed by defendant's employees it was tested by them by driving golf balls against it.

It also appears that the plaintiff was a man thirty-eight years of age; that he had played golf for ten years, and on the 18th day of June, 1928, he wanted a pair of shoes and went to the defendant's store; that he had seen the advertisement and went to the sporting goods department to witness the exhibition; that when he arrived he saw the mesh netting was of cords of a fairly heavy size, and the spaces were pretty well filled around the net by spectators; that there was a space back

In the month of March, 1938, David Frankel, who represented a New York clothing concern, called upon Hekene Barnhart, who was in charge of the men's store of the defendant, and said to Barnhart that the national open golf championship was to be held in June, 1938; that he, Frankel, thought he could get eight or ten of the leading professionals who would be in the city at that time to perform in the sporting goods department of the defendant. Barnhart asked him how much he would have to pay for such an exhibition, and he replied that he was not positive, but thought the whole thing could be managed for \$800.00, to which Barnhart agreed.

Barnhart put an advertisement in the papers advertising the golf exhibition and caused to be erected the equipment for the exhibition. He was not present when the plaintiff was injured. The exhibition was given in a mesh netting of cords owned and put up by the defendant. It was ten feet wide by twenty feet long and twelve feet high. Around the bottom for a height of thirty-six inches was a wire screening, which was nailed to the floor. The mesh netting was drawn tight and laced to an iron frame, and was also drawn tight and laced to the wire screening at the bottom. After the net was connected by defendant's employees it was tested by them by driving golf balls against it.

It also appears that the plaintiff was a man thirty-eight years of age; that he had played golf for ten years, and on the 18th day of June, 1938, he wanted a pair of shoes and went to the defendant's store; that he had seen the advertisement and went to the sporting goods department to witness the exhibition; that when he arrived he saw the mesh netting was of cords of a fairly heavy size, and the ropes were pretty well filled around the net by spectators; that there was a space bet-

of the man giving the exhibition occupied by visitors, and there were others alongside the net; that when he arrived Kirkwood was giving the exhibition; that he stood beside the net in front of Kirkwood, and was standing about two feet from the net in line with other people; that in making a drive the ball was sliced and it hit the net and punched it out; that the plaintiff testified, "I don't know how far it drove the net out," and further, "I should think it was loose;" that the net thus driven out by the impact of the ball struck the plaintiff in the right eye; that the plaintiff further testified that he knew Kirkwood to be one of the well-known golfers; that he observed the net, and that he stood at the side of the net; that Kirkwood was standing on a platform with his back to the end of the net; that plaintiff was standing about ten feet from the point where Kirkwood was driving the ball, that is, a little less than halfway the length of the net; and that he was standing in front of Kirkwood to his right side, facing him.

It is contended by the defendant that Joe Kirkwood, who was giving the demonstration at the time of the injury to the plaintiff, was not an agent or employee of the defendant so as to make it liable for his negligence, even if the evidence established he was negligent; that slicing a golf ball in and of itself is not negligence; that the net was properly constructed, did not give way, and that the plaintiff was not in the exercise of ordinary care for his own safety in standing so close to this net at the time when the net struck him by the propelling force of a golf ball that was sliced.

The undisputed facts in this case are that an exhibition was given by the defendant in its sporting goods department of the performance of certain professional golf players on the day of the accident to the plaintiff. The notice of this

of the men giving the exhibition occupied by visitors, and there were others alongside the net; that when he arrived Kirkwood was giving the exhibition; that he stood beside the net in front of Kirkwood, and was standing about two feet from the net in line with other people; that in making a drive the ball was struck and it hit the net and rebounded is out; that the plaintiff testified, "I don't know how far it drove the net out," and further, "I should think it was loose;" that the net thus driven out by the impact of the ball struck the plaintiff in the right eye; that the plaintiff further testified that he knew Kirkwood to be one of the well-known golfers; that he observed the net, and that he stood at the side of the net; that Kirkwood was standing on a platform with his back to the end of the net; that plaintiff was standing about ten feet from the point where Kirkwood was driving the ball, that is, a little less than halfway the length of the net; and that he was standing in front of Kirkwood to his right side, facing him.

It is contended by the defendant that Joe Kirkwood,

who was giving the demonstration at the time of the injury to the plaintiff, was not an agent or employee of the defendant so as to make it liable for his negligence, even if the evidence established he was negligent; that although a golf ball is and of itself is not negligent; that the net was properly constructed, did not give way, and that the plaintiff was not in the exercise of ordinary care for his own safety in standing so close to this net at the time when the net struck him by the propelling force of a golf ball that was sliced.

The undisputed facts in this case are that an exhibition was given by the defendant in its sporting goods department of the performance of certain professional golf players on the day of the accident to the plaintiff. The notice of this

exhibition was advertised by the defendant, and in order to protect the public attending, the defendant erected a net which enclosed a certain part of its store so that golf balls driven by the performers were prevented from injuring any of the persons witnessing the performance. The persons present on the date in question were invited by the defendant, and it therefore was the duty of the defendant to use reasonable care in providing a reasonably safe place for the safety of the plaintiff, as well as other persons attending, to witness this exhibition.

The visitors had a right to rely on the sufficiency of the netting to protect them from injury, and to assume that the position in which they were permitted to stand by the defendant was a reasonably safe place. The plaintiff in this case had no reason to believe that he was in a dangerous place when he stood in a position to witness the exhibition. The defendant owed a duty to the plaintiff to keep the premises in a reasonably safe condition for the plaintiff's safety.

Dowling v. MacLean Drug Co., 248 Ill. App. 370.

In the case of Kiewert v. Balaban & Katz Corp., 251 Ill. App, 342, this court in passing upon the duty of an owner of a theatre in providing a safe place for a patron says:

"When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. Feldman v. Chicago Rys. Co., 289 Ill. 25; Sheets v. Star Cleaners & Dyers, Inc., 238 App. 323; Walsh v. Moore, 244 Ill. App. 458."

The Supreme Court, in appssing upon the question of negligence involved in the case of O'Rourke v. Field & Co., 307 Ill. 197, says:

"The doctrine of res ipsa loquitur does not, as is supposed, apply to this case. It does not apply where

exhibition was advertised by the defendant, and in order to protect the public attending, the defendant erected a net which enclosed a certain part of the stage so that golf balls driven by the performers were prevented from injuring any of the persons witnessing the performance. The persons present on the date in question were invited by the defendant, and it therefore was the duty of the defendant to use reasonable care in providing a reasonably safe place for the safety of the plaintiff, as well as other persons attending, to witness this exhibition.

The witness had a right to rely on the sufficiency of the netting to protect them from injury, and to assume that the position in which they were permitted to stand by the defendant was a reasonably safe place. The plaintiff in this case had no reason to believe that he was in a dangerous place when he stood in a position to witness the exhibition. The defendant owed a duty to the plaintiff to keep the premises in a reasonably safe condition for the plaintiff's safety.

Corbin v. Keaton, 244 Ill. App. 270.

In the case of Keaton v. Keaton, 244 Ill. App. 270.

App. 242, this court is leaning upon the duty of an owner of a theatre in providing a safe place for a patron says:

"When a thing which has caused or may cause injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. Keaton v. Keaton, 244 Ill. App. 270.

Keaton v. Keaton, 244 Ill. App. 270.

Keaton v. Keaton, 244 Ill. App. 270.

The Supreme Court, in answering upon the question of negligence involved in the case of Keaton v. Keaton, 244 Ill. App. 270.

"The doctrine of res ipsa loquitur does not, as is supposed, apply to this case. It does not apply where

there is evidence of specific negligence. That doctrine is that while negligence is not, as a general rule, to be presumed, yet where the injury occurs as the proximate result of an act which under ordinary circumstances would not, if done with due care, have injured anyone, the case is taken out of the general rule and becomes one in which there is a presumption of negligence; also where the instrument effecting the injury is shown to be under the management of the one charged with negligence or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management of such instrument use proper care, such fact affords reasonable evidence, in the absence of explanation by the defendant, to raise the presumption that the accident arose from negligence on the part of the one having the management of such instrument. In this case, as we have seen, the record shows negligence in permitting the handhold to become loose on the toy in question. Moreover, the declaration charges such negligence."

We are of the opinion that the questions involved in this case whether the plaintiff exercised due care and caution, and whether the defendant was negligent, as charged, are questions for the jury, and this court will not reverse unless the evidence is such that the verdict is clearly against the manifest weight of the evidence.

The defendant complains of certain instructions that were given to the jury at the request of the plaintiff. One of said instructions is as follows:

"The Court instructs the jury that the plaintiff, J. L. Francis, is not required by law to establish his case beyond a reasonable doubt but is merely bound to prove it by a preponderance or greater weight of the evidence."

The defendant suggests that this instruction is erroneous for two reasons. The first one is that the instruction does not limit the consideration of the jury to the case made by the plaintiff's declaration; and second, that this instruction minimizes the requirement that there must be a preponderance of the evidence in favor of the plaintiff, and that the court was in error in stating to the jury that the plaintiff was merely bound to prove it by a preponderance or

there is evidence of specific negligence. That doctrine is that while negligence is not a general rule, it is presumed, yet where the injury occurs as the proximate result of an act which under ordinary circumstances would not, it done with due care, have injured anyone, the case is taken out of the general rule and becomes one in which there is a presumption of negligence; also where the instrument effecting the injury is shown to be under the management of the one charged with negligence or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management of such instrument use proper care, such fact affords reasonable evidence, in the absence of explanation by the defendant, to raise the presumption that the accident arose from negligence on the part of the one having the management of such instrument. In this case, as we have seen, the record shows negligence in permitting the handhold to become loose on the toy in question. Moreover, the declaration charges such negligence.

It is of the opinion that the questions involved in this case whether the plaintiff exercised due care and caution, and whether the defendant was negligent, as charged, are questions for the jury, and this court will not reverse unless the evidence is such that the verdict is clearly against the manifest weight of the evidence.

The defendant complains of certain instructions that were given to the jury at the request of the plaintiff. One of said instructions is as follows:

"The Court instructs the jury that the plaintiff, I. I. Fritzsche, is not required by law to establish his case beyond a reasonable doubt but is merely bound to prove it by a preponderance or greater weight of the evidence."

The defendant asserts that this instruction is erroneous for two reasons. The first one is that the instruction does not limit the consideration of the jury to the case made by the plaintiff's declaration; and second, that this instruction minimizes the requirement that there must be a preponderance of the evidence in favor of the plaintiff, and that the court was in error in stating to the jury that the plaintiff was merely bound to prove it by a preponderance or

greater weight of the evidence. This instruction may be criticized for the use of the word "merely", but we do not believe that this is reversible error. The court in the same instruction called the attention of the jury to the law that the plaintiff must prove his case by the greater weight of the evidence, and that part of the instruction emphasizes that the greater weight of the evidence is necessary before the plaintiff can recover; and the court did not by the use of the word "merely" indicate to the jury that the preponderance of the evidence was a small matter, or minimize the requirement that before the plaintiff can recover it is necessary that he prove his case by a preponderance of the evidence. This instruction is not subject to the same criticism as made by the Supreme Court in its opinion in the case of Molloy v. Chicago Rapid Transit Co., 335 Ill. 164, to the instruction there under consideration. The instruction in the instant case was approved by the Supreme Court in the case of Pierson v. Lyon & Healy, 243 Ill. 370, in these words:

"It is contended the court erred in instructing the jury, on behalf of appellee, 'that the plaintiff is not bound to prove his case beyond a reasonable doubt but is merely bound to prove it by a preponderance of the evidence.' This instruction was approved in Chicago Consolidated Traction Co. v. Schritter, 232 Ill. 364, and is also sustained by Chicago City Railway Co. v. Nelson, 215 Ill. 436, Taylor v. Felsing, 184 id. 331, Chicago City Railway Co. v. Bundy, 210 id. 39, and other cases that might be cited."

It is further objected to by the defendant that the court erroneously instructed the jury as follows:

"The court instructs the jury that it is the law of this State that owners and operators of stores and merchandising places who invite the public to become patrons and guests, owe the duty to such members of the public as may lawfully be upon their premises of exercising ordinary care and caution to avoid injury to such persons."

and counsel for defendant contend that the instruction places a higher duty on the owners and operators of stores than the law

greater weight of the evidence. This instruction may be
existenced for the use of the word "merely", but we do not
believe that this is reversible error. The court in the same
instruction called the attention of the jury to the fact that
the plaintiff must prove his case by the greater weight of the
evidence, and that part of the instruction emphasizes that the
greater weight of the evidence is necessary before the plaintiff
can recover; and the court did not by the use of the word
"merely" indicate to the jury that the preponderance of the
evidence was a small matter, or minimize the requirement that
before the plaintiff can recover it is necessary that he prove
his case by a preponderance of the evidence. This instruction
is not subject to the same criticism as made by the defense in its
brief in the case of Wiley v. Chicago & North Western Co.,
353 Ill. 194, as the objection there was overruled.
The instruction in the instant case was approved by the Supreme
Court in the case of Wiley v. Chicago & North Western Co., 353 Ill. 194, in
these words:

"It is contended that the court erred in instructing
the jury, on behalf of the plaintiff, that the plaintiff is
not bound to prove his case by a preponderance of the
evidence, but that he is bound to prove it by a greater weight
of the evidence. This instruction was approved in Wiley v.
Chicago & North Western Co., 353 Ill. 194,
and is also sustained by Wiley v. Chicago & North Western Co.,
353 Ill. 194, Wiley v. Chicago & North Western Co.,
353 Ill. 194, and Wiley v. Chicago & North Western Co.,
353 Ill. 194, and other cases that might be cited."

It is further objected by the defendant that the

court erroneously instructed the jury as follows:

"The court instructs the jury that it is the duty
of this court to determine the facts in the case and to
and recommending of the law to the jury. It is the duty of
the court to determine the facts in the case and to
of the public as well as to protect the rights of the
existing ordinary care and caution to avoid injury
to such persons."

and counsel for defendant contend that the instruction is
higher duty on the court and operation of the law.

requires; that the law does not make the owner or operator of a store an insurer of the safety of those lawfully upon its premises.

The Supreme Court in the case of Fauckner v. Waken, 231 Ill. 276, says:

"If one avail himself of permission to cross another's land, he does so by virtue of the license and not of right. The permission of license is a justification for his entry, and while he is not technically a trespasser, yet the duty of the owner to guard him against injury is governed by the rules applicable to trespassers. * * * The duty to one who comes thereon by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of premises required for the purpose of his visit. Under such circumstances the party is said to be on the premises by implied invitation of the owner."

which rule was approved in the case of Franey v. Union Stock Yards Co. 235 Ill. 522. The court in this instruction does not direct a verdict, but announces a rule to guide the jury in its deliberation, and if all the instructions taken as a whole correctly guide the jury as to the law, failure to include all elements necessary to recover does not necessarily make this instruction bad.

And further, the court at the request of the defendant instructed the jury that a preponderance of the evidence must show that the plaintiff was in the exercise of ordinary care for his own safety, and that the injury to the plaintiff was caused by negligence charged, and that the accident was caused by the negligence of someone in the employ of the defendant. The instruction objected to, together with other instructions in the record, correctly states the law, and we are unable to find any error in this instruction, but find that it is within the rule of the Supreme Court in the case of Franey v. Union Stock Yards Co., supra.

regulates; that the law does not make the owner an insurer of the safety of those lawfully upon the premises.

The Supreme Court in the case of Invitation v. Walker,

231 Ill. 576, says:

"If one avails himself of permission to enter another's land, he does so at the invitation of the landowner and not at right. The permission of the landowner is a justification for his entry, and while he is not technically a trespasser, yet the duty of the owner to guard him against injury is governed by the rules applicable to trespassers. The duty to one who comes upon the land of another is to exercise reasonable care for the safety of the person in which the landowner is mutually interested in so exercising reasonable care for his safety while on that portion of premises regulated for the purpose of his visit. Under such circumstances the duty is said to be on the premises by implied invitation of the owner."

which rule was approved in the case of Invitation v. Walker, 231 Ill. 576.

231 Ill. 576. The court in this instruction does not direct

a verdict, but announces a rule to guide the jury in its

deliberation, and it is the instruction taken as a whole

correctly guide the jury as to the law, failure to include all

elements necessary to recover does not necessarily make this

instruction bad.

and further, the court at the request of the defendant

instructed the jury that a preponderance of the evidence must

show that the plaintiff was in the exercise of ordinary care

for his own safety, and that the injury to the plaintiff was

caused by negligence charged, and that the accident was caused

by the negligence of someone in the employ of the defendant. The

instruction objected to, together with other instructions in

the record, correctly stated the law, and we are unable to find

any error in this instruction, but find that it is within the

rule of the Supreme Court in the case of Invitation v. Walker, 231 Ill. 576.

Yates Co., Appra.

"Appellee was upon the premises at the time of the accident, not as a trespasser or licensee, but by virtue of implied invitation, and was entitled to the protection of the law requiring appellant to exercise reasonable care to guard him against injury."

The trial court instructed the jury in two instructions what the issues were, and the plaintiff had the right to request the court to inform the jury by instructions what the allegations were under the different counts of the declaration. We are familiar with the rule that the jury is not permitted to take the declaration into the jury room upon their retirement to consider the verdict, Bernier v. Illinois Central R. R. Co., 296 Ill. 464, and that the only way to inform the jury of the allegations is by proper instructions. This was done in the instant case, but complaint is made that a material allegation was omitted in these instructions in not telling the jury that the golf ball was struck with great force by defendant's then servant and agent. This, however, was cured by an instruction given at the request of the defendant to the effect that the plaintiff must prove his case by a preponderance or greater weight of the evidence before he could recover; that the accident was caused by some negligence of someone in the employ of the defendant, Marshall Field & Co., or someone over whom Marshall Field & Co. exercised control and supervision; and we are, therefore, of the opinion that the instructions did fairly inform the jury of the allegations and the proof necessary before the plaintiff could recover.

It is also urged that the trial court erred in instructing the jury as follows:

"You are instructed that the only care and caution required of the plaintiff, J. L. Francois, at and before the time of the accident in question in Marshall Field & Company's store, was such conduct and care and caution for his own personal safety as a reasonably prudent and cautious person would have exercised under the same or like conditions and circumstances."

"Appellee was upon the premises at the time of the accident, not as a trespasser or licensee, but by virtue of invited invitation, and was entitled to the protection of the law against negligent or intentional acts to which his personal injury."

The trial court instructed the jury in two instructions

what the issues were, and the plaintiff had the right to

request the court to inform the jury by instructions what

the issues were under the different counts of the declar-

ation. He was familiar with the rule that the jury is not

permitted to take the declaration into the jury room upon

their retirement to consider the verdict. Smith v. Smith

Central N. W. Co., 200 Ill. 404, and that the only way to inform

the jury of the allegations is by proper instructions. This

was done in the instant case, but complaint is made that a

material allegation was omitted in these instructions is not

telling the jury that the defendant was struck with a

force by defendant's then servant and agent. This, however,

was cured by an instruction given at the request of the

defendant to the effect that the plaintiff must prove his case

by a preponderance of proof in the case of the witness before

he can recover; that the accident was caused by some negli-

gence of someone in the employ of the plaintiff, whether field

agent, or someone over whom defendant field agent controlled

control and supervision; and he was, therefore, of the opinion

that the instructions did fairly inform the jury of the issues

and the proof necessary before the plaintiff could recover.

It is also urged to the effect that error in

instructing the jury as follows:

"You are instructed that the only care and control required of the plaintiff, J. A. Smith, is and before the time of the accident in question in which field agent A. Smith, was such conduct and care and control for his own personal safety as a reasonably prudent and cautious person would have exercised under the same or like conditions and circumstances."

"If you believe from a preponderance or greater weight of the evidence that the plaintiff at the time of and prior to the accident in question, exercised that degree of care and caution for his own safety, that an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that the plaintiff was at and before the time of the accident in question, in the exercise of ordinary care for his own safety."

The defendant points out that these two instructions informed the jury that the plaintiff exercised that degree of care for his own safety, that an ordinarily prudent person would have exercised under the same circumstances, and contends that what an ordinarily prudent person would do under the same circumstances might be evidence of ordinary care, but is not to be taken as fixing the legal standard for the conduct required by law. An ordinarily prudent person under the same circumstances might himself be careless.

Considering the two instructions, it is clear that the trial court in instructing the jury that

"If you believe from a preponderance or greater weight of the evidence that the plaintiff at the time of and prior to the accident in question exercised that degree of care and caution for his own safety."

had in mind that evidence is necessary to establish that the plaintiff was in the exercise of due care and caution for his own safety.

The jury is further guided by a necessary element that in order to determine the plaintiff's care it was necessary for the jury to consider what care and caution an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence.

These instructions were justified by the evidence in that the plaintiff and spectators were permitted by the defendant to stand at the sides of the net in a position that was apparently safe.

"If you believe from a preponderance of greater weight of the evidence that the plaintiff at the time of and prior to the accident in question, exercised that degree of care and caution for his own safety, that an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that the plaintiff was at and before the time of the accident in question, in the exercise of ordinary care for his own safety."

The defendant points out that these two instructions

informed the jury that the plaintiff exercised that degree of care for his own safety, that an ordinarily prudent person would have exercised under the same circumstances, and contends that that an ordinarily prudent person would be under the same circumstances might be evidence of ordinary care, but is not to be taken as fixing the legal standard for the conduct required by law. An ordinarily prudent person under the same circumstances might indeed be careless.

Considering the two instructions, it is clear that

the trial court in instructing the jury that

"If you believe from a preponderance of greater weight of the evidence that the plaintiff at the time of and prior to the accident in question exercised that degree of care and caution for his own safety."

had in mind that evidence is necessary to establish that the plaintiff was in the exercise of due care and caution for his own safety.

The jury is further guided by a necessary element that

in order to determine the plaintiff's care it was necessary

for the jury to consider what care and caution an ordinarily

prudent person would have exercised under the same circumstances and conditions as shown by the evidence.

These instructions were justified by the evidence in

that the plaintiff and witnesses were permitted by the defendant to stand at the sides of the road in a position that was reasonably safe.

The court did not err in refusing to give an instruction offered by the defendant to the effect that the evidence fails to sustain any allegation of the plaintiff's declaration that the person driving the golf ball was at the time of the occurrence an agent or servant. The instruction is bad in assuming facts, but it does appear that the jury was instructed to the effect that it must appear from a preponderance of the evidence that the accident was caused by some negligence of someone in the employ of the defendant, or someone over whom the defendant exercised control or supervision.

Some complaint is made that the damages are excessive. Damages are for the jury to determine from the evidence under the instructions of the court. This court from the record finds no good reason to disturb the judgment on the ground that it is excessive. The plaintiff's vision of the right eye is permanently impaired. We cannot say that the verdict is the result of passion or prejudice.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The court did not err in refusing to give an instruction
tion offered by the defendant to the effect that the evidence
fails to sustain any allegation of the plaintiff's negligence
that the person driving the golf ball was at the time of the
occurrence an agent or servant. The instruction is bad in
assuming facts, but it does so for that the jury was instructed
to the effect that it must appear from a preponderance of the
evidence that the accident was caused by some negligence of
someone in the employ of the defendant, or someone over whom
the defendant exercised control or supervision.
Does defendant is made that the damages are excessive.
Damages are for the jury to determine from the evidence under
the instructions of the court. This court from the record
finds no good reason to disturb the judgment on the ground that
it is excessive. The plaintiff's view of the right eye is
permanently impaired. We cannot say that the verdict is the
result of passion or prejudice.
Finding no reversible error in the record, the
judgment is affirmed.

1911-12-10

WILSON, J. L. AND KELLEY, J. L. JUDGES.

34421

F. S. HENDRICKS, doing business under
the firm name and style of F. S.
HENDRICKS & CO.,

Appellee,

v.

SAM ORNER,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

260 I.A. 628⁴

Opinion filed March 11, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

The plaintiff, a real estate broker, brought suit in the Circuit Court of Cook County against the defendant for commissions arising out of a sale of the defendant's apartment and store building to Peter Vassilos. A trial was had before a jury, and a verdict was returned for the plaintiff in the sum of \$6,900. The court, after overruling a motion by the defendant for a new trial and in arrest of judgment, entered judgment on the verdict, from which the defendant appeals.

It appears from the evidence that the plaintiff and his secretary testified to the effect that when the defendant listed his property for sale with the plaintiff the defendant agreed to pay the plaintiff three per cent commission; that thereafter the plaintiff ran advertisements in the Chicago Tribune for two or three months, and that Peter Vassilos came into the plaintiff's office in May, 1925, in response to one of these advertisements; that the plaintiff stated that he immediately told the defendant over the telephone that he had a prospective buyer by the name of Peter Vassilos, and told him who Vassilos was, where he lived and the nature of his business; that Vassilos was taken through the premises first by the plaintiff and again at the direction of the plaintiff's secretary; that the plaintiff made several visits to Vassilos' store in attempting to promote the deal; that during all this time the plaintiff kept the defendant informed of the progress of the

F. C. HENDERSON, doing business under the firm name and style of F. C. HENDERSON & CO.,

124431

124431

Appellee,

v.

SAM WATSON,

124431

Appellant.

Opinion filed March 11, 1931

MR. JUSTICE BRADLEY delivered the opinion of the court. The plaintiff, a real estate broker, brought suit in the District Court of Cook County against the defendant for commissions arising out of a sale of the defendant's apartment and store building to Peter Vessalios. The first was had before a jury, and a verdict was returned for the plaintiff in the sum of \$1,000. The court, after overruling a motion by the defendant for a new trial and in arrest of judgment, entered judgment on the verdict, from which the defendant appeals.

It appears from the evidence that the plaintiff and his secretary testified to the effect that when the defendant listed his property for sale with the plaintiff the defendant agreed to pay the plaintiff three per cent commission; that thereafter the plaintiff ran advertisements in the Chicago Tribune for two or three months, and that Peter Vessalios came into the plaintiff's office in May, 1928, in response to one of these advertisements; that the plaintiff stated that he immediately told the defendant over the telephone that he had a prospective buyer by the name of Peter Vessalios, and told him the details of the property, and the nature of his business; that the line was taken through the plaintiff's first by the plaintiff and again in the attention of the plaintiff's secretary; that the plaintiff made several visits to the store in attempting to promote the sale; that during this time the plaintiff kept the defendant informed of the progress of the

deal; that the defendant told the plaintiff to keep after Vassilos and to try to get him to raise his price. The offer for the property was \$230,000, which was not satisfactory to the defendant. It also appears that the plaintiff submitted this offer to the defendant by a letter dated June 1, 1935, which stated:

"We have a proposition from a party by the name of Peter Vassilos of \$230,000 with \$30,000 cash subject to the present incumbrance. This is his first offer and if you cannot consider it, we may be able to raise him some."

About a week after the mailing of the letter the plaintiff called the defendant on the telephone and asked about the deal, and the defendant said, "That has already been signed up. I have already signed up the contract with Vassilos, you don't get no commission we got together, we done that ourselves. Why should I pay you a commission when we made the deal ourselves?"

From the evidence offered by the defendant, it appears that the plaintiff could not get Vassilos to make a better offer, and that subsequently Vassilos purchased the property from the defendant at a price of \$345,000, which sale was made through the efforts of the South East Realty Company, represented by one Thomas McCutcheon; that Vassilos had never seen the plaintiff in regard to the property after he made his offer of \$230,000, and that the plaintiff had nothing to do with the making of the contract between the defendant and Vassilos, which contract was finally consummated.

The defendant contends that the plaintiff cannot recover unless he has established by a preponderance of the evidence that he procured a purchaser ready, able and willing to purchase the property upon terms satisfactory to the defendant; that if the plaintiff abandoned the deal he cannot recover commission if the deal was finally consummated with the defendant through efforts other than his; and where, as in this case, there is no exclusive

deal; that the defendant told the plaintiff to keep after Vassilios and to try to get him to raise his price. The offer for the property was \$250,000, which was not satisfactory to the defendant. It also appears that the plaintiff submitted this offer to the defendant by a letter dated June 1, 1935, which stated:

"We have a proposition from a party by the name of Peter Vassilios of \$250,000 with \$10,000 cash subject to the present installment. This is his first offer and if you cannot consider it, we may be able to raise him some."

About a week after the mailing of the letter the plaintiff called the defendant on the telephone and asked about the deal, and the defendant said, "That has already been signed up. I have already signed up the contract with Vassilios, you don't get no commission we got together, we done our own selves. Why should I pay you a commission when we made the deal ourselves?"

From the evidence offered by the defendant, it appears that the plaintiff could not get Vassilios to make a better offer, and that subsequently Vassilios purchased the property from the defendant at a price of \$250,000, which sale was made through the efforts of the South East Realty Company, represented by one Thomas MacIntosh; that Vassilios had never seen the plaintiff in regard to the property after he made his offer of \$250,000, and that the plaintiff had nothing to do with the selling of the contract between the defendant and Vassilios, which contract was finally consummated.

The defendant contends that the plaintiff cannot recover unless he has established by a preponderance of the evidence that he procured a purchaser ready, able and willing to purchase the property upon terms satisfactory to the defendant; that if the plaintiff abandoned the deal he cannot recover commission if the deal was finally consummated with the defendant through efforts other than his and where, as in this case, there is no evidence

agency established the defendant has a right to sell to any person he desires; that even though the plaintiff did start the negotiations which finally terminated in the sale of the property through an intervening cause, yet in the absence of a showing of bad faith by the defendant, the plaintiff is not entitled to recover.

The defendant admits in his brief that the plaintiff's evidence is substantially as follows: Hendricks had submitted the property to Vassilos at a price of \$265,000, as per particulars furnished by the defendant to the plaintiff; that Vassilos examined the property and made an offer of \$230,000; that when this offer was submitted to the defendant by the plaintiff it was refused, and the plaintiff was told by the defendant to get a better offer; that the plaintiff saw Vassilos but could not get any other offer; that the plaintiff wrote a letter dated June 1, 1925, to the defendant, and a week after the letter was written he called the defendant on the telephone and was advised that the contract with Vassilos was signed for \$245,000, and that the sale was made by the defendant himself to Vassilos.

It also appears in addition to the above that the plaintiff's evidence tended to show that the defendant agreed to pay three per cent commission; that he advertised the property for sale for two or three months, and that the purchaser, Vassilos, called in response to the advertisement in the Chicago Tribune; that the particulars of the building were furnished to the prospective buyer, and that the plaintiff called the defendant on the telephone at the time Vassilos first called. This evidence of the plaintiff, which is disputed by the defendant, and the evidence of McGutcheon that he procured Vassilos to purchase the property, or that he first acted in the deal as contended for by the plaintiff after Vassilos had called his attention to this building, were questions of fact for the jury to pass on, and in doing so, no doubt they

agency established the defendant has a right to sell to any person he desires; that even though the plaintiff did start the negotiations which finally terminated in the sale of the property through an intervening cause, yet in the absence of a showing of bad faith by the defendant, the plaintiff is not entitled to recover.

The defendant admits in his brief that the plaintiff's evidence is substantially as follows: Heretofore had submitted the property to Vasiles at a price of \$250,000, but not particularly furnished by the defendant to the plaintiff; that Vasiles examined the property and made an offer of \$250,000; that when this offer was submitted to the defendant by the plaintiff it was refused; and the plaintiff was told by the defendant to get a better offer; that the plaintiff saw Vasiles but could not get any other offer; that the plaintiff wrote a letter dated June 1, 1935, to the defendant, and a week after the letter was written he called the defendant on the telephone and was advised that the contract with Vasiles was signed for \$250,000, and that the sale was made by the defendant himself to Vasiles.

It also appears in addition to the above that the plaintiff's evidence tended to show that the defendant agreed to pay three per cent commission; that he advertised the property for sale for two or three months, and that the purchaser, Vasiles, called in response to the advertisement in the City Directory; that the particulars of the building were furnished to the prospective buyer, and that the plaintiff called the defendant on the telephone at the time Vasiles first called. This evidence of the plaintiff, which is disputed by the defendant, and the evidence of Vasiles that he procured Vasiles to purchase the property, or in the first place in the deal as contended for by the plaintiff, were questions Vasiles had called his attention to this building, were questions of fact for the jury to pass on, and in doing so, no doubt they

considered the question of the credibility of the witnesses and applied the instructions of the court to the facts in reaching the conclusion they did in finding the issues for the plaintiff.

The verdict of the jury is sustained in the principle by the law announced by the Supreme Court in the case of Hafner v. Herron, 165 Ill. 243, in these words:

"Nor is it always necessary, that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively, that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. * * * It is also true, that, where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions."

Complaint is made by the defendant that the court erred in giving what appears to be a tendered instruction of the plaintiff, which is as follows:

"The Court instructs the jury if you believe from the evidence that the defendant employed the plaintiff, Hendricks, as a broker to procure a purchaser for the real estate in question and agreed to pay Hendricks a commission for obtaining such a purchaser, and, if you further believe from the evidence that Hendricks thereafter was the procuring cause of the consummation of the sale of said real estate, then he is entitled to his commission even though the terms of the contract of sale were different from those obtained by Hendricks from Vassilos and even though the deal was actually closed by some one else."

and it is urged that the instruction is erroneous in that it does not take into account the element of bad faith or fraud, which prevented plaintiff from closing the deal for the sale of the property.

It appears that the two instructions given by the court at the request of the defendant are to the same effect, and agree with the plaintiff's given instruction. These instructions are as follows:

"The court instructs the jury if you find from the evidence the defendant listed his property with two or more brokers, including the plaintiff, that it is not the broker who first speaks of the property, but he who is the procuring cause of

considered the question of the credibility of the witnesses and applied the instructions of the court to the facts in reaching the conclusion they did in finding the issues for the plaintiff.

The verdict of the jury is sustained in principle by the law announced by the Supreme Court in the case of Waller v. Norton, 105 Ill. 341, in these words:

"Nor is it always necessary, that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively, and the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. It is also true, that where the seller consents to the sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commission."

Complaint is made by the defendant that the court erred in giving what appears to be a reversed instruction of the plaintiff, which is as follows:

"The court instructs the jury if you believe from the evidence that the defendant employed the plaintiff, Henderson, as a broker to procure a purchaser for the real estate in question and agreed to pay Henderson a commission for obtaining such a purchaser, and if you further believe from the evidence that Henderson thereafter was the procuring cause of the consummation of the sale or said real estate, then he is entitled to his commission even though the terms of the contract of sale were different from those offered by Henderson to Vassilios and even though the deal was actually closed by some one else."

and it is urged that the instruction is erroneous in that it does not take into account the element of duty or "trust", which prevented plaintiff from closing the deal for the sale of the property.

It appears that the two instructions given by the court at the request of the defendant are to the same effect, and, taken with the plaintiff's given instruction, these instructions are as follows:

"The court instructs the jury if you find from the evidence the defendant listed his property with two or more brokers, including the plaintiff, that it is not the broker who first speaks of the property, but he who is the procuring cause."

of the sale, be he the first or the second to engage the attention of the purchaser, that is entitled to commissions."

"The court instructs the jury that unless the owner of the property especially agrees not to do so, he may employ two or more brokers to negotiate the sale of his property, and in such case it is the broker who is the efficient or procuring cause of the sale who is entitled to commission and his right is not affected by the fact he sells to one whose attention to the property had before been called by another broker."

It is apparent that the issue in this case is whether the plaintiff or someone else was the procuring cause in the sale of this particular property? This appears to be so, for no instructions were offered upon any other theory. If the defendant wanted an instruction upon the theory contended for, it was the duty of the defendant to ask for such additional instruction.

Verboomen v. Chicago City Railway, 178 Ill. App. 606; Drury, et al v. Connell, et al. 177 Ill. 43; Wilkinson v. Service, 249 Ill. 146; Village of Sheridan v. Hibbard, 119 Ill. 307.

Upon consideration of all the facts and the several points contended for, we have reached the conclusion that the evidence offered in the case is not against the clear manifest weight of the evidence and that there was no error in the rulings of the court or in the instructions. Accordingly, the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

of the sale, be he the first or the second to exercise the attention of the purchaser, that is entitled to commission."

"The court instructed the jury that unless the owner of the property expressly agrees not to do so, he may employ two or more brokers to negotiate the sale of his property, and in such case it is the broker who is the efficient or procuring cause of the sale who is entitled to commission and his right is not affected by the fact he sells to one whom attention to the property had before been called by another broker."

It is apparent that the issue in this case is whether the plaintiff or someone else was the procuring cause in the sale of this particular property. This appears to be set for no instructions were offered upon any other theory. If the defendant wanted an instruction upon the theory contended for, it was the duty of the defendant to ask for such additional instruction.

Vernon v. Chicago City Railway, 178 Ill. App. 603; City of Chicago v. Connelley, 42 Ill. App. 43; Chicago v. Connelley, 148 Ill. App. 148; Village of Sheridan v. Niagara, 138 Ill. App. 302.

Upon consideration of all the facts and the several points contended for, we have reached the conclusion that the evidence offered in the case is not sufficient to entitle either party of the evidence and that there was no error in the ruling of the court or in the instructions. Accordingly, the judgment is affirmed.

Appellate.

WILSON, J., for the court.

34430

TONY TALLARICO,

Appellee,

v.

NEWARK FIRE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. C 28⁵

Opinion filed March 11, 1931

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an action filed in the Municipal Court of Chicago by the plaintiff against the defendant to recover for an alleged loss by fire under a fire insurance policy issued by the defendant. The case was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,000, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment, and from which the defendant appeals to this court.

The action was commenced and a statement of claim filed on November 30, 1926, in which the plaintiff alleges, in substance, the issuance of a certain fire insurance policy insuring the plaintiff to the extent of \$1500, against direct loss and damage to the contents of the building occupied by the plaintiff at 524 South Robey street, Chicago, which contents consisted of furniture, fixtures, groceries and butcher supplies, and that the term of said policy was from October 24th, 1925, at noon, to October 24, 1926, at noon. It alleges the payment by the plaintiff of the premium, and that on January 12, 1926, for causes unknown, the plaintiff suffered a loss by fire to his property located in the premises, and that the property was of the market value of \$3,000. It is also alleged that the plaintiff gave immediate notice

JOHN T. MALLON

Appellee

v.

NEWARK FIRE INSURANCE COMPANY,
a corporation

Appellant

Opinion filed March 11, 1931

The plaintiff, John T. Mallon, delivered the opinion of the court. This is an action filed in the Municipal Court of Chicago by the plaintiff against the defendant to recover for an alleged loss by fire under a fire insurance policy issued by the defendant. The case was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,100, with costs of court, after overruling motions for a new trial and in arrest of judgment, entry of judgment, and then which the defendant appeals to this court.

The action was commenced and a statement of claim filed on November 30, 1928, in which the plaintiff alleges, in substance, the issuance of a certain fire insurance policy insuring the plaintiff to the extent of \$1,000, of that first loss or damage to the contents of the building located on the plaintiff at 524 South Lacey Street, Chicago, which said loss consisted of turn-overs, fixtures, groceries, and other contents, and that the term of said policy was from December 1st, 1927, to March 1st, 1928, at noon. It alleges the payment by the plaintiff of the premium, and that on January 1, 1928, for reasons unknown, the plaintiff suffered a loss by fire to the contents located in the premises, and that the property was of the market value of \$1,000. It is also alleged that the plaintiff had insurable interest

of the loss to the defendant on or about January 13, 1926, and stated the amount and value of said property damage, and the defendant received said report and proof as satisfactory proof of loss for said claim; that he complied with each and every requirement in said policy, except only such performance as had been waived by the defendant.

Thereafter, on January 21, 1930, the plaintiff filed an amended statement of claim, which contained the same allegations, except that in the latter part of February, 1926, the plaintiff demanded payment under said policy, and thereupon the defendant made the accusation that the fire was caused by the direct act of the plaintiff, and refused to pay the monies due under said policy, and that it did not then become necessary for the plaintiff to give notice to the defendant of the occurrence of the fire, or file proof of loss required by the policy,

To this amended statement of claim the defendant filed its affidavit of merits to the effect that the defendant did not make and deliver to the plaintiff any policy of insurance insuring the plaintiff against loss or damage to the contents of the premises, in the terms or in the manner set forth; that the plaintiff did not on January 13, 1926, for causes unknown to him, suffer any loss by fire to his property; that the fire was caused by the wilful and intentional act or procurement of the plaintiff with the intention of burning or destroying the property, with intent to defraud the defendant; and further, that the plaintiff did not give notice to the defendant of the loss, or state in detail the kind, character or value of the property, and did not in the latter part of February, 1926, or at any other time, demand payment from the defendant of any sum, nor did defendant at any time, deny liability or refuse to pay because plaintiff caused the fire; and further, that said policy provides that no suit or action on the policy for the recovery of

of the loss to the defendant on or about January 15, 1936, and stated the amount and value of said property damaged, and the defendant received said report and proof as satisfactory proof of loss for said claim; that he complied with each and every requirement in said policy, except only such performance as had been waived by the defendant.

Thereafter, on January 21, 1936, the plaintiff filed an amended statement of claim, which contained the same allegations, except that in the latter part of February, 1936, the plaintiff demanded payment under said policy, and thereupon the defendant made the accusation that the fire was caused by the direct act of the plaintiff, and refused to pay the money due under said policy, and that it did not then become necessary for the plaintiff to give notice to the defendant of the occurrence of the fire, or file proof of loss required by the policy.

To this amended statement of claim the defendant filed its affidavit of denial to the effect that the defendant did not make and deliver to the plaintiff any policy of insurance insuring the plaintiff against loss or damage to the contents of the premises in the fire or in the manner set forth; that the plaintiff did not on January 15, 1936, for causes unknown to him, suffer any loss by fire to his property; that the fire was caused by the plaintiff intentional act or procurement of the plaintiff with the intention of burning or destroying the property, with intent to defraud the defendant; and further, that the plaintiff did not give notice to the defendant of the loss, or state in detail the kind, character or value of the property, and did not in the latter part of February, 1936, or at any other time, demand payment from the defendant of any sum, nor did defendant at any time, deny liability or refuse to pay because plaintiff caused the fire; and further, that said policy provides that no suit or action on the policy for the recovery of

any claim should be sustainable in any court unless commenced within twelve months next after the date of the fire, and that the plaintiff's amended statement of claim filed on January 21, 1930, stated a new and different cause of action.

It appears from the evidence that the plaintiff, upon the trial, offered in evidence the policy of insurance, which was objected to by the defendant; that the evidence further tends to show that the plaintiff closed the store between 8:30 and 9:00 o'clock on the night of January 12, 1926, securely locking all the doors, left and went to his rooming house, ate dinner and attended a Union meeting about two miles from the store, where he remained until 10:00, or shortly thereafter; that he then returned home, arriving about 12:00 o'clock midnight; that he did not return to the store after leaving early in the evening; that he first heard of the fire about 1:00 o'clock in the morning of January 13th, when police officers came to his room and told him there was a fire in his store, which started about 12:30 A. M., and charged him with having set fire to the premises and placed him under arrest; that thereafter the plaintiff was charged with arson for the burning of the building, which charge was nolle prossed, but the plaintiff was convicted in the Municipal Court upon a charge of malicious injury to the property of another, which conviction was reversed by the Appellate Court because of failure to prove that the property referred to in the complaint was the property of another, and that the injury was without the consent of the owner; that a friend of the plaintiff, about January 15, telephoned the defendant's agents that there had been a fire in the store, and that some person in the office of the defendant's agent stated that it would be taken care of; that the plaintiff, about March 3, following the fire, for the first time went back to the store, but only remained there a few minutes, and about the 3rd or 4th of March the plaintiff, with

any claim should be maintainable in any court unless commenced within twelve months next after the date of the fire, and that the plaintiff's amended statement of claim filed on January 21, 1930, stated a new and different cause of action.

It appears from the evidence that the plaintiff, upon the trial, offered in evidence the policy of insurance, which was objected to by the defendant; that the evidence further tends to show that the plaintiff closed the store between 8:30 and 9:00 o'clock on the night of January 15, 1930, securely locking all the doors, left and went to his rooming house, ate dinner and attended a Union meeting about two miles from the store, where he remained until 10:30, or shortly thereafter; that he then returned home, arriving about 12:00 o'clock midnight; that he did not return to the store after leaving early in the evening; that he first heard of the fire about 1:00 o'clock in the morning of January 15th, when police officers came to his room and told him there was a fire in his store, which started about 12:30 A. M., and destroyed him with having set fire to the premises and placed him under arrest; that thereafter the plaintiff was charged with arson for the burning of the building, which charge was not upheld, but the plaintiff was convicted in the Municipal Court upon a charge of malicious injury to the property of another, which conviction was reversed by the Appellate Court because of failure to prove that the property referred to in the complaint was the property of another, and that the injury was without the consent of the owner; that a friend of the plaintiff, about January 15, telephoned the defendant's agent that there had been a fire in the store, and that some person in the office of the defendant's agent stated that it would be taken care of; that the plaintiff, about March 1, following the fire, for the first time went back to the store, but only remained there a few minutes, and about the 2nd or 3rd of March the plaintiff, with

his friend, went to the office of the agents and demanded payment of the loss, and that the agents there told him they would not pay the loss because the plaintiff himself set fire to the premises, and then sent him to an adjuster in relation to the matter, and that the adjuster, on the same day, told them that the defendant would not pay the loss because the plaintiff had caused the fire, but that said defendant would pay back the premium that was paid by the plaintiff.

On the part of the defendant there was evidence tending to show that the actual loss by fire was slight; that no notice of the fire was ever given to the defendant's agents, as claimed, and that the agents did not have any knowledge of the loss until five or six months after the fire, when the plaintiff advised them of it at their office. The plaintiff was told that they knew nothing about it, but they suggested that he go and see an adjuster who had been interested in the adjustment of the building loss, and possibly he would know something about it.

It also appears from the evidence that in addition to the policy of insurance of the defendant, the subject of this controversy, there was a policy of insurance on the same property issued by the Union Assurance Society, Ltd. to the plaintiff, payable in the sum of \$1500 in the event of loss.

One of the contentions of the defendant is that the cause of action set forth in the amended statement of claim was barred by the provision of the policy that no action thereon for the recovery of any claim shall be sustainable unless commenced within twelve months next after the fire; that the plaintiff in his original statement of claim proceeded upon the theory of the making proof of loss, which the defendant accepted as sufficient under the policy, and in the amended statement of claim plaintiff proceeded upon the theory that the defendant denied liability and

his friend, went to the office of the agents and demanded payment of the loss, and that the agents there told him they would not pay the loss because the plaintiff himself set fire to the premises, and then sent him to an adjuster in relation to the matter, and that the adjuster, on the same day, told them that the defendant would not pay the loss because the plaintiff had caused the fire, but that said defendant would pay back the premium that was paid by the plaintiff.

On the part of the defendant there was evidence tending to show that the actual loss by fire was slight; that no notice of the fire was ever given to the defendant's agents, as claimed, and that the agents did not have any knowledge of the loss until five or six months after the fire, when the plaintiff advised them of it at their office. The plaintiff was told that they knew nothing about it, but they suggested that he go and see an adjuster who had been interested in the adjustment of the building loss, and possibly he would know something about it.

It also came from the witness that in relation to the policy of insurance of the defendant, the subject of this controversy, there was a policy of insurance on the same property, issued by the Union Assurance Society, Ltd. to the plaintiff, payable in the sum of \$100 in the event of loss.

One of the contentions of the defendant is that the cause of action set forth in the amended statement of claim was barred by the provision of the policy that no action thereon for the recovery of any claim shall be maintainable unless commenced within twelve months next after the fire; that the plaintiff in his original statement of claim proceeded upon the theory of the making proof of loss, which the defendant accepted as sufficient under the policy, and in the amended statement of claim plaintiff proceeded upon the theory that the defendant denied liability and

waived the making of the proper proofs of loss which amended statement of claim states a new or different cause of action.

It is well to have in mind that the plaintiff alleged in the original statement that he complied with each and every requirement of said policy, except only such performance as had been waived by the defendant. The rule uniformly announced has been that if additional counts in a declaration state a new cause of action or a different cause of action from that originally stated, a plea of the statute of limitations is good. In the instant case, however, performance in the filing of a notice and proof of loss was excused by the denial of liability for the loss by the defendant. This evidence of waiver would have been competent under the plaintiff's original statement of claim. That being so it cannot be logically or truthfully said that the amended statement of claim stated a different cause of action. The amended statement made specific that which was alleged in general terms in the original statement of claim. Chicago General Ry. Co. v. Carroll, 189 Ill. 273. We conclude, therefore, that the filing of the amended statement of claim was not barred by the policy limitation of one year.

The defendant complains that the court erred in the part of the oral charge to the jury which is as follows:

"The Court further instructs the jury that, on the affirmative defense raised by the defendant charging the loss to plaintiff's intentional act, the burden of proof is upon the defendant to prove, beyond all reasonable doubt, that the alleged loss or damage by fire mentioned in plaintiff's amended statement of claim was caused by the wilful and intentional act or procurement of the plaintiff."

As authority, the defendant cites, in support of its contention, the case of Rost v. Noble & Co., 316 Ill. 357, wherein the Supreme Court says:

...to have just this to see a statue minor to them

It is not to have in mind at least of the

in the original statement that he considered it to be good and every

regularment to hold policy, except only self performance - had a concentrated down view & some

been waived by the defendant. The rule uniformly promulgated has

been that it had been in a position to be a

YARRIGATO : de port Moltre le centre industriel et de culture de

and all, from an opportunity to observe and to enjoy a variety

the editor in chief and his associates, however, have insisted

Proof of loss ** provided by the tenant for the

loan by the defendant and was given to passive aid

1. The first step in the process of the investigation is to identify the problem.

being as it is not be logically or truthfully said that the meaning

add. notes to given text file a batchwise to increase

reminded at present, and is realistic that what was stated in General

Form in the original at request of client. Original retained by client.

Y. UNITED STATES OF AMERICA, Plaintiff, vs. JAMES EARL RAY, Defendant.

to the amended statement of intent to submit in response to the policy

very much to molt still

THE UNIVERSITY OF CHICAGO PRESS

part of the original and the copy of the original is to be kept in the original.

the other is not intended to be a statement of fact, but a statement of opinion. The statement of fact is a statement of what is known to be true, and the statement of opinion is a statement of what is believed to be true. The statement of fact is a statement of what is known to be true, and the statement of opinion is a statement of what is believed to be true.

at: to progress in, and to understand the

convention, the case of *West v. Noble* & Co., 10 F. 11, 187, 187.

THE NATIONAL ARCHIVES

"The rule had its origin in England, where there was a reason for its existence arising from the fact that there, 'where a defendant justifies words which amount to a charge of felony and proves his justification the plaintiff may be put on his trial by that verdict without the intervention of a grand jury' (Cook v. Field, 3 Esp. 133.) This reason never existed in this country. The rule is universal that in criminal prosecutions the evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt. In general, where civil rights only are involved, the decision must be upon the preponderance of the evidence. The English rule, where the issue is upon a charge of crime made in the pleadings and necessary to be proved to maintain the action or defense, was followed in some of the States, but has now generally been abandoned. (citing authorities)."

From a careful examination of this opinion it is clear that the Supreme Court did not make the distinction contended for between a crime which is a felony under the statute of this state and one that is such at common law, but the rule is to be applied where a felony is charged when it used this language:

"The reason in which the rule seems to have had its origin is applicable only to cases where the charge was of a felony, and in general it is in such cases, only, that the rule has been applied. It will not be extended further but is limited to charges of felony. The offenses for which penalties are imposed by the statute are not crimes of a character the charge of which in a civil suit is required to be proved beyond a reasonable doubt, and the instruction properly so advised the jury."

Cooper v. Nutt, 254 Ill. App. 445.

From the evidence it appears that the plaintiff is charged by the defendant with the intentional burning of his own property, to defraud the insurers, which is punishable by imprisonment in the penitentiary and is a felony under our statutes. Cahill's Ill. Stats. Chap. 38, Paragraph 614. Therefore, under the facts in this case it was not error for the court to charge the jury in the quoted words set forth in this opinion.

In passing upon the defendant's further contention that the verdict and judgment are contrary to the evidence and that the damages are excessive, we find that the evidence of the plaintiff, who testified in relation to his loss by fire, was uncertain and not convincing, so that the jury was unable to

"The rule had its origin in England, where there was a reason for its existence existing from the fact that there 'where a defendant testifies under oath to a charge of felony and proves his justification the plaintiff may be put on his trial by that verdict without the intervention of a grand jury' (Good v. Field, 5 Mass. 125). This reason never existed in this country. The rule is universal that in criminal prosecutions the evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt. In general, where civil rights only are involved, the decision must be upon the correspondence of the evidence. The English rule, where the issue is upon a charge of crime made in the pleadings and necessary to be proved to sustain the action or defense, was followed in some of the States, but has not generally been abandoned. (Citing authorities)."

From a careful examination of this opinion it is clear that the Kansas Court did not take the position contended for between a crime which is a felony under the laws of this state and one that is such as common-law, but the rule is to be applied where a felony is charged when it was not a felony. The reason in which the rule seems to have its origin is nowhere only to cases where the charge was of a felony, and in general it is in such cases only, that the rule has been applied. It will not be extended further and is limited to charges of felony. The extension for which petitioners are asked by the state and not the state of Kansas is limited to charges of which in civil suit is required to be proved beyond a reasonable doubt, and the instruction properly so advised the jury.

Good v. Field, 5 Mass. 125, 126.

From the evidence it was to be that the plaintiff is charged by the defendant with the intentional burning of the same property, to defend the same, this is held to be a felony under our statutes. Prisoners in the penitentiary and is a felony under our statutes. California State. Good v. Field, 5 Mass. 125, 126. Under the facts in this case it was not error for the state to charge the jury in the words above set forth in this opinion. In passing upon the defendant's further contention that the verdict and judgment are contrary to the evidence and that the damages are excessive, we find that the evidence of the plaintiff, who testified in relation to his loss of time, is uncertain and not convincing, so that the jury was unable to

determine with reasonable certainty the quantity, price and value of the stock and fixtures. His answers in reply to questions upon this phase of the case were invariably, "about so many dozen," "at about such a price" for the merchandise and also he was uncertain as to the value of the fixtures.

There is testimony in the record of the witness Whilleben, who represented Pandolfi, the mortgagee who claims under a certain chattel mortgage upon the property in question, and who has a claim against the American Central Insurance Company policy, that he made an inventory of all the stock and fixtures he found in the place at the time he visited the premises on March 12, 1926, and it appears from the exhibit in evidence, which was not objected to when offered by the defendant, that the merchandise found by him at the time he made the inventory was of the cost value of \$127.68; that he estimated the damage to such goods at \$68.50, and, also, the damage to the furniture and fixtures at \$422, which strongly contradicts the plaintiff's testimony. Owing to the fact that the plaintiff was the only witness upon this important phase of the case, and the uncertain evidence as to quantities and values, this court is obliged to reverse the judgment and remand the case for a new trial.

There are other questions involved in this appeal, but in view of the conclusions we have reached, it will not be necessary for us to discuss them.

REVERSED AND CASE REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

determine with reasonable certainty the quantity, price and value of the stock and fixtures. His answer is, "I am unable to answer upon this phase of the case with any degree of certainty." "About so many dollars." "At about such a price" for the merchandise and also he was unable to determine as to the value of the fixtures.

There is testimony in the record of the witness, who represented himself, the mortgagee who claims under a certain chattel mortgage upon the property in question, and who has a claim against the American General Insurance Company, that he made an inventory of all the stock and fixtures he found in the place at the time he visited the premises on March 12, 1926, and it appears from the exhibit in evidence, which was not objected to when offered by the defendant, that the merchandise found by him at the time he made the inventory was of the cost value of \$137.68; that he estimated the amount to such goods at \$68.50, and, also, the amount of the fixtures and fixtures at \$425, which strongly contradicts the plaintiff's testimony, which to the fact that the plaintiff was the only witness upon this important phase of the case, and the uncertain evidence as to quantities and values, this court is obliged to reverse the judgment and award the case for a new trial.

There are other questions involved in this case, but in view of the considerations we have reached, it will not be necessary for us to discuss them.

Reversed. 1.7. 1926. 1.7. 1926.

34413

JOSEPHINE N. SCHROEDER,
WILLIAM L. SCHROEDER,

Appellees,

v.

MARYLAND CASUALTY COMPANY,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 629

Opinion filed March 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

ON REHEARING:

This is an appeal by the defendant Maryland Casualty Company, a corporation, from a judgment entered against it in the Municipal Court in favor of the plaintiffs, Josephine N. Schroeder and William L. Schroeder, for the sum of \$506 and costs. Plaintiffs' statement of claim alleges that the defendant entered into an attachment bond in the Municipal Court of Chicago, in a suit therein pending which was entitled, Roy Morrison v. William L. Schroeder and Josephine N. Schroeder; that the defendant signed the bond as surety for Roy Morrison in said suit, that the suit was heard on the attachment issues and the attachment was quashed; that property of the defendants in said action was seized under the attachment and, by reason thereof, plaintiffs in this action were damaged. Attached to the statement of claim was a copy of the bond sued upon which contained among the other provisions, the following:

"Now, if the said Roy Morrison shall prosecute his said suit with effect, and the said attachment shall not be dissolved, or in case of failure in such suit, or the dissolution of such attachment, shall well and truly pay and satisfy the said William L. Schroeder and Josephine N. Schroeder all such costs in said suit and such damages as shall be awarded against the said Roy Morrison heirs, executors or administrators, in any suit or suits which may

JOSEPHINE M. SCHROEDER,
WILLIAM L. SCHROEDER,

Appellees,

v.

MARYLAND CASUALTY COMPANY,
a Corporation,

Appellant.

MUNICIPAL COURT

OF CHICAGO,

1931

Opinion filed March 13, 1931

MR. JUSTICE JUSTICE delivered the opinion of

the court.

ON REHEARING:

This is an appeal by the defendant Mary and Josephine M. Schroeder from a judgment entered against it in the Municipal Court in favor of the plaintiff, Josephine M. Schroeder and William L. Schroeder, for the sum of \$100 and costs. The plaintiff's statement of claim alleges that the defendant entered into an attachment bond in the Municipal Court of Chicago, in a suit therein pending which was entitled, JOY MORTIMER v. WILLIAM L. SCHROEDER and JOSEPHINE M. SCHROEDER; that the defendant signed the bond as surety for JOY MORTIMER in said suit; that the suit was heard on the attachment issues and the attachment was granted; that a property of the defendant in said action was seized under the attachment and, by reason thereof, plaintiff in this action was damaged. Attached to the statement of claim was a copy of the bond upon which contained among the other provisions, the following:

"Now, if the said JOY MORTIMER in its petition file said suit with itself, and the said statement shall not be dissolved, or in case of failure to file said suit, the dissolution of such attachment, shall not finally pay and satisfy the said WILLIAM L. SCHROEDER and JOSEPHINE M. SCHROEDER all such costs in said suit and such damages as shall be awarded against the said JOY MORTIMER, its executors or administrators, in any suit or suits which may

hereafter be brought for wrongfully suing out the said Attachment, then the above obligation to be void; otherwise to remain in full force and effect."

The defendant answered the statement of claim and denied that the issues were found for the defendants in the attachment suit or that the plaintiffs suffered any damages by reason of the defendant signing said attachment bond. The cause was tried with a jury and a verdict returned in favor of the plaintiffs, on which verdict judgment was entered.

The defendant presents in his brief four points which are urged as ground for reversal of this judgment:

First, that the statement of claim does not set forth a cause of action against this defendant and that the evidence fails to disclose that the condition of the bond had been performed;

Second, the trial court erroneously admitted evidence as to damages and that the said damages are excessive;

Third, that certain prejudicial remarks were made by the court during the proceeding;

Fourth, that the testimony of the attorney for the plaintiffs should not be considered.

Under the first point made, the defendant argues that the bond provides that the surety shall pay such costs and damages as may be awarded against Roy Morrison and that it became necessary for the plaintiffs to first procure such a judgment. Defendant did not seek, however, to raise this issue in the trial court, but answered the statement of claim by charging that the issues were found for the defendant in the attachment suit and that the plaintiffs had not suffered any damage. If it wished to avail itself of the defense advanced here, it should have presented that question to the trial court in the proper manner, but instead it joined issue and proceeded to trial.

hereafter be brought for wrongfully suing out the said Attachment, then the above obligation to be void; otherwise to remain in full force and effect."

The defendant answered the statement of claim and denied that the issues were found for the defendant in the attachment suit or that the plaintiff suffered any damages by reason of the defendant signing said attachment bond. The cause was tried with a jury and a verdict returned in favor of the plaintiff, on which verdict judgment was entered.

The defendant presents in his brief four points which are urged as ground for reversal of this judgment:

First, that the statement of claim does not set forth a cause of action against this defendant and that the evidence fails to disclose that the condition of the bond had been performed;

Second, the trial court erroneously admitted evidence as to damages and that the said damages are excessive;

Third, that certain prejudicial remarks were made by the court during the proceedings;

Fourth, that the testimony of the attorney for the plaintiff should not be considered.

Under the first point made, the defendant argues that the bond provides that the surety shall pay such costs and damages as may be awarded against Roy Morrison and that it becomes necessary for the plaintiff to first procure such a judgment. Defendant did not seek, however, to raise this issue in the trial court, but answered the statement of claim by stating that the issues were found for the defendant in the attachment suit and that the plaintiff had not suffered any damage. It is wished to recall itself of the defense advanced here, it should have presented that question to the trial court in the proper manner, but instead it joined issue and proceeded to trial.

It is also insisted here that the statement of claim is defective in that the principal should have been joined with the surety in the action; that having seen fit to sue the surety alone, it was necessary for them to allege in their statement of claim that damages had been assessed against the principal. We do not consider this to be the rule. The action was one in contract, based upon the bond which was attached to the statement of claim and made a part thereof. It was clear that it was the intention of the plaintiffs to sue on the bond and not in tort. The principal was a proper party to the proceeding, but not a necessary one. On a motion to strike the claim for want of proper parties, it might have been the duty of the trial court to have granted the motion. Such a motion in its nature would amount to a plea in abatement. By failing to make a proper motion of this character, defendant waived the irregularity and should not be allowed to proceed to trial for the purpose of experimenting on the result of a verdict. After having been defeated in the trial court, it should not be now permitted to raise a question which was available to it before the trial and thus necessitate a new trial with the burden of the additional costs incident to an additional proceeding.

"The Supreme Court of this State in the case of Rutter & Co. v. McLaughlin, 257 Ill. 199, in its opinion says:

"The fact that the joint liability is not claimed to cover all the items of plaintiff's demand does not abrogate the rule requiring that a non-joinder of parties be set up by a preliminary plea, which gives the plaintiff a better writ if he chooses to avail himself of it. 1 Chitty's Pl. (4th Am. ed.) 458; Hill v. White, 6 Bing. 23; Prunty v. Mitchell, 76 Va. 169; Wilson v. McCormick, 86 Id. 995."

To the same effect see Atkinson, et al v. Foster, 134 Ill. 472; Mantonys v. Reilly, 184 Ill. 183.

It frequently happens that the fact that there is an additional party necessary to the proceeding appears during the course of the trial and, under such circumstances, that the court

It is also insisted here that the statement of claim is defective in that the principal should have been joined with the surety in the action; that having been left to see the surety alone, it was necessary for them to allege in their statement of claim that damages had been assessed against the principal. We do not consider this to be the rule. The action was one in contract, based upon the bond which was attached to the statement of claim and made a part thereof. It was clear that it was the intention of the plaintiff to sue on the bond and not in tort. The principal was a proper party to the proceeding, but not a necessary one. On a motion to strike the claim for want of proper parties, it might have been the duty of the trial court to have granted the motion. Such a motion in its nature would amount to a plea in abatement. By failing to make a proper motion of this character, defendant waived the irregularity and should not be allowed to proceed to trial for the purpose of exacting on the result of a verdict. After having been delayed in the trial court, it should not be now permitted to raise a question which was available to it before the trial and that constitutes a new trial with the burden of the additional costs incident to an additional proceeding.

"The Supreme Court of this State in the case of Butter & Co. v. McLaughlin, 527 Ill. 135, in its opinion says:

"The fact that the joint liability is not claimed to cover all the items of plaintiff's demand does not deprive the rule requiring that a non-joinder of parties be set up by a preliminary plea, which gives the plaintiff a better right if he chooses to avail himself of it. I think it is (4th Am. ed.) 482; Hill v. Hill, 6 Ill. 23; Gray v. Kitchell, 70 Ill. 120; Wison v. Thompson, 30 Ill. 355."

To the same effect see Atkinson et al v. Foster, 101 Ill. 47; Wentworth v. Kelly, 104 Ill. 185.

It frequently happens that the fact that there is an additional party necessary to the proceeding appears during the course of the trial and, under such circumstances, that the court

could not enter a judgment without affecting such party adversely. Under such circumstances the court will not enter a final judgment which would affect the interests of such a party. It also happens at times that the fact that there is a proper or even necessary party appears only during the course of the proceeding and after the pleadings have been made up and, under such circumstances, the court should protect the interests of all parties to the proceeding. In the case at bar, however, it was apparent upon the face of the statement of claim that the principal in the attachment proceeding had not been made a party defendant and the matter could have been brought to the attention of the court as already suggested by a motion to strike. It is insisted that this action was one of the fourth class and that, therefore, this court should consider the case on its merits because of the statute under which the Municipal Court was created. This statute, however, does not dispense with the proper motions necessary to call the trial court's attention to objections which should be made in apt time.

It is insisted that the statement of claim does not show a cause of action because it shows on its face that the principal was not joined as a party. With this we can not agree because in our opinion the statement of claim did show a good cause of action against the defendant. The omission of the principal as a party, did not go to the merits of the action, but was one, as already stated, which could have been cured by a proper motion in the trial court, it being an action on the bond. The plaintiff having the right to sue the parties on a written instrument, so far as the defendant here was concerned, the statement of claim was good.

Objection is made to the admission of certain testimony by the court on the question of damages. The rule seems to be that the amount of damages recoverable includes the actual expenses and

could not enter a judgment without affecting such party adversely. Under such circumstances the court will not enter a final judgment which would affect the interests of such a party. It also appears at times that the fact that there is a proper or even necessary party appears only during the course of the proceeding and after the pleadings have been made up and, under such circumstances, the court should protect the interests of all parties to the proceeding. In the case at bar, however, it was apparent upon the face of the statement of claim that the principal in the attachment proceeding had not been made a party defendant and the matter could have been brought to the attention of the court as already suggested by a motion to strike. It is insisted that this motion was one of the fourth class and that, therefore, this court should consider the case on its merits because of the statute under which the Municipal Court was created. This statute, however, does not distinguish the proper motions reasonably to call the trial court's attention to objections which should be made at that time.

It is insisted that the statement of claim does not show a cause of action because it shows on its face that the principal was not joined as a party. With this we can not agree because in our opinion the statement of claim did show a good cause of action against the defendant. The omission of the principal as a party, did not go to the merits of the action, but was one, as already stated, which could have been cured by a proper motion in the trial court, it being an action on the bond. The plaintiff having the right to sue the parties on a written instrument, as far as the defendant here was concerned, the statement of claim was good.

Objection is made to the admission of certain testimony by the court on the question of damages. The rule seems to be that the amount of damages recoverable includes the actual expenses and

the loss resulting in the levying of the attachment including counsel's fees for services rendered in relation to the attachment. A sum of money amounting to \$6,747, on deposit in the bank was seized and tied up for five weeks. The defendants in the attachment suit were compelled to attend court, coming over a considerable distance. One of the defendants was engaged in business in Wisconsin and was compelled to close her business during her attendance. The other defendant was employed and earning a per diem wage which he lost by reason of his being compelled to attend the attachment proceedings. The loss of the use of the funds during the period of time it was idle, by reason of the attachment suit, was a proper element to consider as were also the other items already enumerated. Damron v. Sweetser, Caldwell & Co., 16 Ill. App. 339; First State Bank of Pond Creek v. Clark, 202 Ill. App. 283, and cases cited.

We have examined the record with reference to the argument that the remarks of the trial court were prejudicial, and are of the opinion that they were not of such a character as to constitute error.

It was not error for the attorney to testify as to the value of the services rendered by him.

Plaintiffs call our attention to the fact that no motions were made for a directed verdict and no motion for a new trial shown in the bill of exceptions. The defendant insists that this being an action of the fourth class, brought in the Municipal Court, it was not necessary to make a motion for a new trial and cite the case of Fralle v. Metropolitan Life Ins. Co., 252 Ill. App. 460, in support of their contention. An examination of this case, however, discloses that this question was not necessary to a consideration of the case inasmuch as the defendant was permitted by leave of court to file a supplemental record showing that the motion for a new trial had, in fact, been made and overruled. Mr. Justice

the loss resulting in the levying of the attachment including counsel's fees for services rendered in relation to the attachment. A sum of money amounting to \$8,747.00 deposit in the bank was seized and tied up for five weeks. The defendant in the attachment suit were compelled to attend court, coming over a considerable distance. One of the defendants was engaged in business in Wisconsin and was compelled to close her business during her attendance. The other defendant was employed and earning a good wage which he lost by reason of his being compelled to attend the attachment proceedings. The loss of the use of the funds during the period of time it was idle, by reason of the attachment suit, was a proper element to consider as well as the other items already enumerated. Bank of Food Creek v. Clark, 202 Ill. App. 202, and cases cited. Danahy v. Sweetser, 240 Ill. App. 259; First State argument that the terms of the trial court were prejudicial, and are of the opinion that they were not of such a character as to constitute error. It was not error for the attorney to testify as to the value of the services rendered by him. Plaintiff calls our attention to the fact that no motions were made for a directed verdict and no motion for a new trial shown in the bill of exceptions. The defendant insists that this being an action of the lower class, brought in the Municipal Court, it was not necessary to make a motion for a new trial and cite the case of Travis v. Metropolitan Life Ins. Co., 238 Ill. App. 460, in support of their contention. An examination of this case, however, disclosed that this question was not necessary to a consideration of the case inasmuch as the defendant was permitted by leave of court to file a supplemental record showing that the motion for a new trial had, in fact, been made and overruled. At this time

Matchett, in that case specially concurring, held that in his view it was necessary in cases of the fourth class in the Municipal Court to preserve the right to question the weight of the evidence by a motion for a new trial. We are of the opinion that such is the correct practice. Such a motion is directed to the verdict. Unless such a motion is made and ruled upon by the trial court, counsel should not, for the first time, be permitted to raise the question of the weight of the evidence on appeal. We do not, however, consider this question necessary to the decision of this case.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

stated, in that case specially concerning, held that in this view
it was necessary in cases of the fourth class in the Municipal
Court to preserve the right to question the weight of the evidence
by a motion for a new trial. He said of the opinion that such is
the correct practice. Such a motion is directed to the verdict.
Unless such a motion is made and ruled upon by the trial court,
counsel should not, for the first time, be permitted to raise the
question of the weight of the evidence on appeal. We do not,
however, consider this question necessary to the decision of this
case.
For the reasons stated in this opinion, the judgment
of the Municipal Court is affirmed.
JUDGE WILLIAMS.

HEBEL AND BIRNEY, JJ. CONCUR.

34413

JOSEPHINE M. SCHROEDER,
WILLIAM L. SCHROEDER,

Appellees,

v.

MARYLAND CASUALTY COMPANY,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

260 I.A. 629^{1A}

Opinion filed Jan. 28, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of
the court.

This is an appeal by the defendant Maryland Casualty Company, a corporation, from a judgment entered against it in the Municipal Court in favor of the plaintiffs, Josephine M. Schroeder and William L. Schroeder, for the sum of \$506 and costs. Plaintiffs' statement of claim alleged that the defendant entered into an attachment bond in the Municipal Court of Chicago, in a suit therein pending which was entitled, Roy Morrison v. William L. Schroeder and Josephine M. Schroeder; that the defendant signed the bond as surety for Roy Morrison in said suit; that the suit was heard on the attachment issues and the attachment was quashed; that property of the defendants in said action was seized under the attachment and, by reason thereof, plaintiffs in this action were damaged. Attached to the statement of claim was a copy of the bond sued upon which contained among the other provisions, the following:

"Now, if the said Roy Morrison shall prosecute his said suit with effect, and the said attachment shall not be dissolved, or in case of failure in such suit, or the dissolution of such attachment, shall well and truly pay and satisfy the said William

IN SENATE

JOSEPHINE H. SCHROEDER,
WILLIAM E. SCHROEDER,

Appellees,

Appellants,

v.

MARYLAND CASUALTY COMPANY,
a Corporation,

Appellant.

300 U.S. 233

Opinion filed Jan. 28, 1931

MR. JUSTICE HOLMES delivered the opinion of

the court.

This is an appeal by the defendant Maryland Casualty

Company, a corporation, from a judgment entered in 1928 in

the Municipal Court in favor of the plaintiffs, Josephine H.

Schroeder and William E. Schroeder, for the sum of \$300 and

costs. Plaintiffs' statement of claim alleged that the

defendant entered into a contract with the plaintiffs to

of Ohio, in a suit against the defendant, which was

Harrison v. William E. Schroeder and Josephine H. Schroeder;

that the defendant signed the bond as surety for the

in said suit; that the suit was tried in the Municipal

and the attachment was quashed; that the entry of the

in said action was held under the act passed, but by reason

thereof, plaintiffs in this action are entitled to

the statement of claim was a copy of the bond which was

contained among the papers, returned, to the court.

Now, if the said bond was returned to the court, it is
his and suit with interest, and the said bond
shall not be dissolved, or in case of failure in
such suit, or the dissolution of such attachment,
shall well and truly pay and satisfy the said claim.

L. Schroeder and Josephine W. Schroeder all such costs in said suit and such damages as shall be awarded against the said Roy Morrison heirs, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said Attachment, then the above obligation to be void; otherwise to remain in full force and effect."

The defendant answered the statement of claim and denied that the issues were found for the defendants in the attachment suit or that the plaintiffs suffered any damages by reason of the defendant signing said attachment bond. The cause was tried with a jury and a verdict returned in favor of the plaintiffs, on which verdict judgment was entered.

The defendant presents in his brief four points which are urged as ground for reversal of this judgment:

First, that the statement of claim does not set forth a cause of action against this defendant and that the evidence fails to disclose that the condition of the bond had been performed;

Second, the trial court erroneously admitted evidence as to damages and that the said damages are excessive;

Third, that certain prejudicial remarks were made by the court during the proceeding;

Fourth, that the testimony of the attorney for the plaintiffs should not be considered.

Under the first point made, the defendant argues that the bond provides that the surety shall pay such costs and damages as may be awarded against Roy Morrison and that it became necessary for the plaintiffs to first procure such a judgment. The condition in the bond attached to the statement of claim and made a part thereof is essentially the same as that required by the Attachment Act found in Cahill's Illinois Revised Statutes, Chap. 11, sec. 5,. It was held in ~~Korth~~

L. Schroeder and Josephine M. Schroeder all such costs in said suit and such damages as shall be awarded against the said Roy Harrison heirs, executor or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect."

The defendant answered the statement of claim and

denied that the issues were found for the defendant in the

attachment suit or that the plaintiff suffered any damages

by reason of the defendant signing said attachment bond. The

cause was tried with a jury and a verdict returned in favor of

the plaintiff, on which verdict judgment was entered.

The defendant presents in his brief four points

which are urged as ground for reversal of this judgment:

First, that the statement of claim does not set forth

a cause of action against this defendant and that the evidence

fails to disclose that the condition of the bond had been

performed;

Second, the trial court erroneously admitted evidence

as to damages and that the jury damages are excessive;

Third, that certain prejudicial remarks were made by

the court during the proceedings;

Fourth, that the testimony of the attorney for the

plaintiff should not be considered.

Under the first point made, the defendant argues

that the bond provided that the surety shall pay such costs and

damages as may be awarded against Roy Harrison and that it

became necessary for the plaintiff to first procure such a

judgment. The condition in the bond attached to the statement

of claim and made a part thereof is essentially the same as

that required by the attachment not found in Lewis's Illinois

Revised Statutes, Chap. 11, sec. 5. It was held in Wright.

~~Slovak Evangelical Augsburg Denom., 202 Ill. App. 280,~~ that an action could be brought either on the bond or as a tort action against the parties. This court held in the case of Omaha National Bank v. United States Fidelity & Guaranty Co. 244 Ill. 204, that the suit upon the dismissal of the attachment might be brought in tort against the principal, or might be brought on the bond. We see no reason why the plaintiffs should first be compelled to sue the principal, before they could sue on the bond. Defendant did not seek, however, to raise this issue in the trial court, but answered the statement of claim by charging that the issues were found for the defendant in the attachment suit and that the plaintiffs had not suffered any damage. If it wished to avail itself of the defense advanced here, it should have presented that question to the trial court in the proper manner, but instead it joined issue and proceeded to trial.

It is also insisted here that the statement of claim is defective in that the principal should have been joined with the surety in the action; that having seen fit to sue the surety alone, it was necessary for them to allege in their statement of claim that damages had been assessed against the principal. We do not consider this to be the rule. The action was one in contract, based upon the bond which was attached to the statement of claim and made a part thereof. It was clear that it was the intention of the plaintiffs to sue on the bond and not in tort. The principal was a proper party to the proceeding, but not a necessary one. On a motion to strike the claim for want of proper parties, it would have been the duty of the trial court to have granted the motion. Such a motion in its nature would amount to a plea in abatement. By failing to make a proper motion of this character, defendant waived the irregularity and should not be allowed to proceed

to trial for the purpose of experimenting on the result of a verdict. After having been defeated in the trial court, it should not be now permitted to raise a question which was available to it before the trial and thus necessitate a new trial with the burden of the additional costs incident to an additional proceeding.

The Supreme Court of this State in the case of Rutter & Co. v. McLaughlin, 257 Ill. 199, in its opinion says:

"The fact that the joint liability is not claimed to cover all the items of plaintiff's demand does not abrogate the rule requiring that a non-joinder of parties be set up by a preliminary plea, which gives the plaintiff a better writ if he chooses to avail himself of it. 1 Chitty's Pl. (4th Am. ed.) 458; Hill v. White, 6 Bing. 23; Prunty v. Mitchell, 76 Va. 169; Wilson v. McCormick, 86 Id. 995."

To the same effect see Atkinson, et al v. Foster, 134 Ill. 473; Mantonys v. Reilly 184 Ill. 183.

It frequently happens that the fact that there is an additional party necessary to the proceeding appears during the course of the trial and, under such circumstances, that the court could not enter a judgment without affecting such party adversely. Under such circumstances the court will not enter a final judgment which would affect the interests of such a party. It also happens at times that the fact that there is a proper or even necessary party appears only during the course of the proceeding and after the pleadings have been made up and, under such circumstances, the court should protect the interests of all parties to the proceeding. In the case at bar, however, it was apparent upon the face of the statement of claim that the principal in the attachment proceeding had not been made a party defendant and the matter could have been brought to the attention of the court as already suggested by a motion to strike. It is insisted that this action was one of the fourth class and

to trial for the purpose of experimenting on the results of a verdict. After having been tested in the trial court, it should not be now permitted to raise a question which was available to it before the trial and then necessitate a new trial with the burden of the additional costs incident to an additional proceeding.

The Supreme Court of this State in the case of

Butter & Co. v. Commonwealth, 187 Ill. 100, in its opinion says:

"The test that the joint liability is not claimed to cover all the items of liability, defendant does not dispute the rule requiring that a non-joinder of parties be set up by a preliminary plea, which gives the plaintiff a better trial if he chooses to trial himself or it. 1 Ill. App. 3d (4th ed. 1931) 100; Wells v. Wells, 100 Ill. App. 3d 100; Wells v. Wells, 100 Ill. App. 3d 100; Wells v. Wells, 100 Ill. App. 3d 100."

To the same effect see Wells v. Wells, 100 Ill. App. 3d 100.

Montgomery v. Wells, 100 Ill. App. 3d 100.

It is frequently held that the fact that there is an additional party necessary to the proceeding is not the course of the trial and, under such circumstances, that the court could not enter a judgment without raising such party adversely. Under such circumstances the court will not enter a final judgment which would affect the interests of such a party. It also happens at times that the fact that there is a proper or even necessary party is not only during the course of the proceeding and after the pleadings have been made up and, under such circumstances, the court should protect the interests of all parties to the proceeding. In the case at bar, however, it was apparent upon the face of the statement of claim that the principal in the statement proceeding had not been cited, party defendant and the matter could have been brought to the attention of the court as already suggested by a motion to dismiss. It is insisted that this action was one of the fourth class and

that, therefore, this court should consider the case on its merits because of the statute under which the Municipal Court was created. This statute, however, does not dispense with the proper motions necessary to call the trial court's attention to objections which should be made in apt time.

It is insisted that the statement of claim does not show a cause of action because it shows on its face that the principal was not joined as a party. With this we can not agree because in our opinion the statement of claim did show a good cause of action against the defendant. The omission of the principal as a party, did not go to the merits of the action, but was one, as already stated, which could have been cured by a proper motion in the trial court, it being an action on the bond. The plaintiff having the right to sue the parties on a written instrument, so far as the defendant here was concerned, the statement of claim was good.

Objection is made to the admission of certain testimony by the court on the question of damages. The rule seems to be that the amount of damages recoverable includes the actual expenses and the loss resulting in the levying of the attachment including counsel's fees for services rendered in relation to the attachment. A sum of money amounting to \$6,747, on deposit in the bank was seized and tied up for five weeks. The defendants in the attachment suit were compelled to attend court, coming over a considerable distance. One of the defendants was engaged in business in Wisconsin and was compelled to close her business during her attendance. The other defendant was employed and earning a per diem wage which he lost by reason of his being compelled to attend the attachment proceedings. The loss of the use of the funds during the period of time it was idle, by reason of the attachment suit, was a proper element to consider as were also the other items already

that, therefore, this court should consider the case on its merits because of the statute under which the Municipal Court was created. This statute, however, does not dispense with

the proper motions necessary to call for a trial court's attention to objections which should be made in due time.

It is insisted that the statement of claim does not

show a cause of action because it shows on its face that the principal was not joined as a party. With this we can not agree

because in our opinion the statement of claim did show a good

cause of action against the defendant. The omission of the principal as a party, did not go to the merits of the action,

but was one, as already stated, which could have been cured

by a proper motion in the trial court, it being an action on the bond. The plaintiff having the right to sue the parties

on a written instrument, as far as the defendant here was

concerned, the statement of claim was good.

Objection is made to the admission of certain testimony

by the court on the question of damages. The law seems to

be that the amount of damages recoverable includes the actual

expenses and the loss resulting in the paying of the attach-

ment including counsel's fees for services rendered in relation

to the attachment. A sum of money amounting to \$5,747, 00

deposited in the bank was seized and tied up for five weeks.

The defendants in the attachment suit were compelled to attend

court, coming over a considerable distance. One of the defend-

ants was engaged in business in Wisconsin and was compelled

to close his business during his attendance. The other

defendant was employed and earning a good living which he lost

by reason of his being compelled to attend the attachment pro-

ceedings. The loss of the use of the funds during the period

of time it was tied up, by reason of the attachment suit, was a

proper element to consider as well as other losses already

enumerated. Damon v. Sweetser, Caldwell & Co. 16 Ill. App. 339; First State Bank of Pond Creek v. Clark, 202 Ill. App. 283, and cases cited.

We have examined the record with reference to the argument that the remarks of the trial court were prejudicial, and are of the opinion that they were not of such a character as to constitute error.

It was not error for the attorney to testify as to the value of the services rendered by him.

Plaintiffs call our attention to the fact that no motions were made for a directed verdict and no motion for a new trial shown in the bill of exceptions. The defendant insists that this being an action of the fourth class, brought in the Municipal Court, it was not necessary to make a motion for a new trial and cite the case of Pralle v. Metropolitan Life Ins. Co., 252 Ill. App. 460, in support of their contention. An examination of this case, however, discloses that this question was not necessary to a consideration of the case inasmuch as the defendant was permitted by leave of court to file a supplemental record showing that the motion for a new trial had, in fact, been made and overruled. Mr. Justice Matchett, in that case specially concurring, held that in his view it was necessary in cases of the fourth class in the Municipal Court to preserve the right to question the weight of the evidence by a motion for a new trial. We are of the opinion that such is the correct practice. Such a motion is directed to the verdict. Unless such a motion is made and ruled upon by the trial court, counsel should not, for the first time, be permitted to raise the question of the weight of the evidence on appeal. We do not, however, consider this question necessary to the decision of this case.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

KNEL AND FRIEND, JJ. CONCUR.

unrepresented. Dawson v. Sweetser, Caldwell & Co. 18 Ill. App. 329;
First State Bank of Long Creek v. Clark, 203 Ill. App. 285.

and cause cited.

We have examined the record with reference to the
argument that the records of the trial court were prejudicial,
and are of the opinion that they were not of such a character
as to constitute error.

It was not error for the attorney to testify as to

the value of the services rendered by him.

His testimony will not constitute error in the fact that no

motion was made for a directed verdict and no motion for a

new trial shown in the bill of exceptions. The defendant

insists that this being an action of the fourth class, brought

in the Municipal Court, it was not necessary to make a motion

for a new trial and also the case of Little v. Williamson, 111 Ill.

App. 301, 203 Ill. App. 285, in support of their contention.

An examination of this case, however, discloses that this ques-

tion was not necessary to a consideration of the case inasmuch

as the defendant was permitted by leave of court to file a

supplemental record showing that the motion for a new trial

had, in fact, been made and overruled. Mr. Justice Macpherson

in that case specifically approving, held that in his view it was

necessary in case of the fourth class in the Municipal Court

to preserve the right to question the weight of the evidence by

a motion for a new trial. He was of the opinion that such is

the correct practice. Such a motion is directed to the verdict.

Unless such a motion is made and ruled upon by the trial court,

counsel should not, for the first time, be permitted to raise the

question of the weight of the evidence on appeal. We do not, how-

ever, consider this question necessary to the decision of this case

For the reasons stated in this opinion, the judgment of

the Municipal Court is affirmed.

JUDGMENT REVERSED.

REBECCAH AND LINDA, JJ. CONCUR.

34697

MINNIE C. BUTTS,
Appellee.

vs.

C. A. ERICKSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 629²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant, C. A. Erickson, from a judgment in a forcible entry and detainer action in favor of plaintiff, Minnie C. Butts. A similar appeal from a similar judgment against defendant was considered by this court in Butts v. Erickson, general number 34696, in which an opinion was filed March 2, 1931, affirming the judgment.

The complaint in that suit was filed in the trial court on July 21, 1930, and the judgment therein was rendered on August 4, 1930. In the present case the complaint was filed August 11, 1930, and the judgment in favor of plaintiff entered on August 23, thereafter. It is contended in this case, as it was contended there, that the finding and judgment of the trial court are against the manifest weight of the evidence; that the trial court erred in refusing to admit competent and material evidence on behalf of defendant, and that the judgment of the trial court is not sustained by the law.

The evidence offered and received is substantially the same in this as in the former case. Unlike the former case, however, in this one plaintiff offered and the court received in evidence two five-day notices in writing with proof of service of the same on defendant on August 5, 1930. One of these notices stated that the rent due for the premises described as 859 North Clark street was \$540, and the other notice stated that the rent due for the remainder of the premises described in the complaint was \$630.

MINNIE C. BUTTS,

Appellant.

vs.

C. A. BRICKSON,

Appellee.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

200 I.A. 022

DELIVERED THE OPINION OF THE COURT.
MR. PRESIDING JUSTICE HATCHETT.

This appeal is by defendant, C. A. Brickson, from a

judgment in a forcible entry and detainer action in favor of plaintiff, Minnie C. Butts. A similar appeal from a similar judgment against defendant was considered by this court in Butts v. Brickson, general number 24696, in which an opinion was filed March 8, 1931, affirming the judgment.

The complaint in that case was filed in the trial court on July 21, 1930, and the judgment therein was rendered on August 4, 1930. In the present case the complaint was filed August 11, 1930, and the judgment in favor of plaintiff entered on August 23, thereafter. It is contended in this case, as it was contended there, that the finding and judgment of the trial court are against the manifest weight of the evidence; that the trial court erred in refusing to admit competent and material evidence on behalf of defendant, and that the judgment of the trial court is not sustained by the law.

The evidence offered and received is substantially the same in this as in the former case. Unlike the former case, however, in this one plaintiff offered and the court received in evidence two five-day notices in writing with proof of service of the same on defendant on August 2, 1930. One of these notices stated that the rent due for the premises described as 606 North Clark street was \$240, and the other notice stated that the rent due for the remainder of the premises described in the complaint was \$230.

Each of the notices stated that the lease would be terminated if the rent was not paid within five days. The premises named in the complaint were described as situated in the City of Chicago and as

"The flats (that is the three floors) above the store commonly known as 851-853-855-857 North Clark street, and the middle and top floors above the store known as 849 North Clark street, in said building, and sufficient basement room for steam plant; also coal room storage under sidewalk and in basement."

Defendant in this suit, as in the former one, contested the action upon the ground that he was not in possession of the premises described in the complaint; that he had assigned his interest in the written lease to C. A. Erickson & Bros., a corporation, whose name was changed in 1930 to Central Contracting Company; that this corporation was in possession of all of these premises and had been in such possession for six years or more and paid all the rent by checks, payable to the order of plaintiff, which had been accepted and collected by her.

The evidence offered and received in this respect is the same as offered and received in the former suit, and in the opinion there filed we reviewed the evidence and held that it was not sufficient to establish any one of these defenses. For the same reasons in this case, we adhere to that decision.

Defendant here, however, makes the further point that the court erred in denying his motion in the nature of a plea in abatement on the ground that another action was pending on appeal which involved the issue as to plaintiff's right to the possession of a part of these premises. Rule 12 of the Municipal court, of which we take notice, provides:

"Where the defendant desires to set up matters in abatement or question the jurisdiction of the court, he shall present the same by a written motion specifying the grounds thereof, and support the same by an affidavit except where the matters relied on to support the motion appear of record. If such motion raises an issue of fact dehors the record the court shall hear evidence presented by the respective parties, provided, that if a jury be demanded the matter shall be set for an immediate hearing."

Each of the notices stated that the lease would be terminated if the rent was not paid within five days. The premises named in the complaint were described as situated in the City of Chicago and as follows: (That is the three floors) above the store commonly known as 321-323-325 North Clark Street, and the middle and top floors above the store known as 327 North Clark Street, in said building, and suitcases basement room for storage; also coal room storage under sidewalk and in basement."

Defendant in this suit, as in the former one, contested the notion upon the ground that he was not in possession of the premises described in the complaint; that he had assigned his interest in the written lease to C. A. Johnson & Bros., a corporation, whose name was changed in 1930 to Central Contracting Company; that this corporation was in possession of all of these premises and had been in such possession for six years or more and paid all the rent by checks, payable to the order of plaintiff, which had been accepted and collected by her.

The evidence offered and received in this respect is the same as offered and received in the former suit, and in the opinion there filed we reviewed the evidence and held that it was not sufficient to establish any one of these defenses. For the same reasons in this case, we adhere to that decision.

Defendant here, however, makes the further claim that the court erred in denying his motion in the nature of a plea in abatement on the ground that neither action was pending on appeal which involved the lease as to plaintiff's right to the possession of a part of these premises. Rule 13 of the Municipal Court, of which we take notice, provides:

"Where the defendant desires to set up matters in abatement or question the jurisdiction of the court, he shall present the same by a written motion specifying the grounds therefor, and support the same by an affidavit sworn before the court on oath on to support the motion upon record. If such motion raises an issue of fact before the court the court shall hear evidence presented by the respective parties, provided, that if a party demands the matter shall be set for an immediate hearing."

Defendant here did not make any such motion but when the notices were offered in evidence objected to the same on the ground that the issue as to plaintiff's right to the possession of the premises described in one of the notices had been formerly heard in the Municipal court and that the case was still pending on appeal taken to the Appellate court. The objection was overruled. We hold the point could not be saved in this manner.

The People v. Lueders, 287 Ill. 107; Chitty, section 469 and note; Puterbaugh Common Law Pleading and Practice, 10th ed., sec. 79. The defense of another action pending is in the nature of a plea in abatement and it is waived by pleading to the merits. The contention is therefore without merit.

We think it quite unnecessary to further discuss the merits of the case. There is no doubt defendant has defaulted in the payment of rent, and by reason of such non-payment he is no longer entitled to the possession of the premises. The purely technical defenses he presents were considered on the former appeal.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

Defendant here did not make any motion and when the notices were offered in evidence objected to the same on the ground that the issue as to plaintiff's right to the possession of the premises described in one of the notices had been formerly heard in the Municipal Court and that the case was still pending on appeal taken to the Appellate Court. The objection was overruled. We hold this point could not be raised in this manner.

The People v. Lawrence, 387 Ill. 107; City of Chicago v. Chicago & North Western Ry. Co., 387 Ill. 107; City of Chicago v. Chicago & North Western Ry. Co., 387 Ill. 107; City of Chicago v. Chicago & North Western Ry. Co., 387 Ill. 107.

The defense of another action pending is in the nature of a plea in abatement and it is waived by pleading to the merits. The contention is therefore without merit.

We think it quite unnecessary so further discuss the merits of the case. There is no doubt defendant has delayed in the payment of rent, and by reason of such non-payment he is no longer entitled to the possession of the premises. The purely technical defenses he presents are considered on the former appeal.

For the reasons indicated the judgment of the trial court is affirmed.

WILLIAM H. WATKINS,

34741

M. A. BRINKER,
Appellee,
vs.

LORNTA M. PACK et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

260 I.A. 629³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellants were defendants to a bill to foreclose a trust deed and have appealed from an order entered June 4, 1930, which found that they were in arrears in the payment of rent for the premises in controversy in the sum of \$425 for May and June and the balance of April, 1930. The order decreed that the clerk issue a writ of assistance forthwith directed to the sheriff to serve on defendants and to repossess the receiver of the premises on or before June 11, 1930. The order directed defendants and all persons acting by, through or under them to vacate the premises on or before that date.

There has been no appearance in this court in behalf of the receiver. It is argued that it was error to award the writ of habeas facias possessionem without first making an order on defendants or those holding under them to surrender possession and causing a copy thereof to be served upon them, after which, upon defendants' refusing to obey, the writ would issue. Such seems to be the rule established by well considered decisions. Kenahaw v. Thompson, 4 Johns. Ch. Rep. 610; Aldrich v. Sharp, 3 Scam. 261; Oglesby v. Pearce, 68 Ill. 220.

For the reasons indicated the order will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

24747

M. A. WILKINSON

Appellant

vs.

JOSEPH W. PAGE et al.
Appellees

APPEAL FROM CIRCUIT COURT

OF COON COUNTY.

22011 329

RECEIVED THE CLERK OF THE COURT
M. WILKINSON JUNIOR MARSHALL

Appellants were defendants to a bill to foreclose a first deed and have appealed from an order entered June 4, 1930, which found that they were in arrears in the payment of rent for the premises in controversy in the sum of \$425 for May and June and the balance of April, 1930. The order decreed that the wife issue a writ of assistance forthwith directed to the sheriff to serve on defendants and to remove the receiver of the premises on or before June 11, 1930. The order directed defendants and all persons acting by, through or under them to vacate the premises on or before that date.

There has been no appearance in this certain behalf of the receiver. It is argued that it was error to award the writ of assistance because without first making an order on defendants or those holding under them to surrender possession and causing a copy thereof to be served upon them, after which, upon defendants' refusal to obey, the writ would issue. Such seems to be the rule established by well considered decisions. Wilkens v. Thompson & Jones, 610 N.W. 2d, 1930, 381
Okla. v. Pearce, 28 Ill. 280.

For the reasons indicated the order will be reversed

and the cause remanded.

REVEREND AND HONORABLE

O'Connor and Kennedy, JJ., concur.

34827

THE FAIR, a Corporation,
Appellee,

vs.

LOUIS G. GARBER and his wife,
MRS. LOUIS G. GARBER,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2001A. 029⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Defendants, husband and wife, appeal from a judgment entered against them in the sum of \$138 upon the finding of the court. The statement of claim, filed March 14, 1930, alleged that defendants were indebted to plaintiff in the sum of \$142 upon an account stated, a copy of which was annexed, and also for goods, wares and merchandise sold and delivered, alleged to be family necessities, for which both husband and wife were liable under section 15, chap. 68 of the Revised Statutes of Illinois.

Defendants filed an affidavit of merits, denying that they were indebted to plaintiff in the sum of \$142 or for any other sum; that there was an account stated in that amount; that they ever agreed to pay that sum, and that plaintiff's claim was for merchandise which were family necessities. The affidavit set up that in December, 1927, Louis Garber purchased a radio from plaintiff upon the condition that he could return the same for credit if not satisfactory; that immediately upon delivery he offered to return the radio and plaintiff agreed to call for it and to give credit therefor, which plaintiff failed to do; that defendants advised plaintiff that they were in possession of the radio subject to plaintiff's orders.

Defendants contend that the finding and judgment of the court are against the manifest weight of the evidence and, in particular, that there was no evidence to justify a finding of the issues against defendant Mrs. Garber upon the theory that the

THE PAIR, a Corporation,
Appellee,

vs.

LOUIS G. GARNER and his wife,
MRS. LOUIS G. GARNER,
Appellants.

APPEAL FROM SUPREME COURT

OF ILLINOIS

MR. JUSTICE THOMAS M. MURPHY
DELIVERED THE OPINION OF THE COURT.

Defendants, husband and wife, appeal from a judgment

entered against them in the sum of \$125 upon the finding of the court. The statement of claim, filed March 14, 1930, alleged that defendants were indebted to plaintiff in the sum of \$125 upon an account stated, a copy of which was annexed, and also for goods, wares and merchandise sold and delivered, alleged to be family necessaries, for which both husband and wife were liable under section 12, chap. 68 of the Revised Statutes of Illinois.

Defendants filed an affidavit of assets, denying that they were indebted to plaintiff in the sum of \$125 or for any other sum; that there was no account stated in fact and that they never agreed to pay the sum, and that plaintiff's claim was for merchandise which was not his necessaries. The affidavit set up that in December, 1927, Louis Garner purchased a radio from plaintiff upon the condition that he could return the same for credit if not satisfactory; that immediately upon delivery he offered to return the radio and plaintiff agreed to take it and to give credit therefor, which plaintiff failed to do; that defendants alleged plaintiff that they were in possession of the radio subject to plaintiff's order.

Between counsel and the finding and judgment of the court are against the plaintiff's claim of the balance and, in particular, that there was no evidence to justify a finding of the issues against defendant and, under upon the theory that the

200-1-100

radio was a family necessity within the meaning of the statute.

The only witness produced by plaintiff was its own attorney, who also tried the cause. His testimony is to the effect that he called on Mrs. Garber and told her that he was from The Fair and would like to speak to her about her account and a radio; that Mrs. Garber stated that he should speak to her husband; that the witness called up Mr. Garber, who "told me that he did not have the radio, that he gave it away, and told me he would get me another radio." The witness testified that he replied that he could not take back another radio and credit their account; that since Mr. Garber gave it away he would have to pay for it, and that the cost was \$142.

This witness further testified that he had the account of Louis G. Garber in a book of original entry, which was correct and kept by the employees in due course of business; that the items were placed in chronological order, and that he, the witness, had charge of this account; that he had the same with him and showed it to Mrs. Garber. The account was admitted in evidence over the objection and purports to be an itemized statement of the account of "Mr. Louis G. Garber," showing charges and credits, including charges of one radio at \$138, two items of court costs of \$4 each, making a total of \$146. Upon cross-examination the witness said that Mr. Garber did not tell him in his telephone conversation that The Fair sold the radio to him with the distinct understanding that it would be installed, and that if it did not meet with his satisfaction he might return it; that Mr. Garber did not tell him that he had been trying for two years to get The Fair to take back the radio or to accept the return of it; that Mr. Garber did not tell him that it had been tendered to The Fair in open court in a case previously instituted by The Fair for the collection of the same account.

radio was a fairly necessary within the meaning of the statute. The only witness produced by plaintiff was its own attorney, who also tried the cause. His testimony is to the effect that he called on Mrs. Garber and told her that he was from the Fair and would like to speak to her about her account and a radio; that Mrs. Garber stated that he should speak to her husband; that the witness called up Mr. Garber, who told me that he did not have the radio, that he gave it away, and told me he would get me another radio." The witness testified that he replied that he could not take back another radio and credit their account; that since Mr. Garber gave it away he would have to pay for it, and that the cost was \$142.

This witness further testified that he had the account of Louis O. Garber in a book of original entry, which was correct and kept by the employee in the course of business; that the items were placed in chronological order, and that he, the witness, had charge of this account; that he had the same with him and showed it to Mrs. Garber. The account was admitted in evidence over the objection and purports to be an itemized statement of the account of "Mr. Louis O. Garber," showing charges and credits, including charges of one radio at \$142, two items of court costs of \$4 each, making a total of \$146. Upon cross-examination the witness said that Mr. Garber did not call him in his telephone conversation that the Fair sold the radio to him with the distinct understanding that it would be installed, and that it did not meet with his satisfaction he might return it; that Mr. Garber did not tell him that he had been trying for two years to get the Fair to take back the radio or to accept the return of it; that Mr. Garber did not tell him that it had been brought to the Fair in open court in a case previously instituted by the Fair for the collection of the same account.

There was a motion at the close of plaintiff's case for a finding in favor of defendants which was denied, and there was a motion by Mrs. Garber for a finding in her favor which was also denied.

Defendant Louis G. Garber testified that he was the same person who had the telephone conversation with plaintiff's attorney; that he had never told that attorney he had disposed of the radio nor had he ever promised to pay \$142 on account of it; that he told the attorney that when he purchased the radio it was not connected; that the salesman told him he might have it connected after it was sent to his home and if he did not like it he should notify The Fair, who would call for it and take it back, otherwise defendant could return it.

Mr. Garber further testified that he had been trying for months and months to return the radio to The Fair but it had refused to take it back; that he told the attorney he had been sued once before and that at that hearing he had offered to return the radio; that The Fair told him in open court that the radio would be picked up; that he told The Fair that it could come and get the radio at any time or that he would deliver the same. Mr. Garber said he did not have the radio in his home at the time of the trial; that he kept it in his home for three years and as plaintiff did not call for it, as promised about six months prior to the trial, and not having room in his home for it he took it over to a friend when he asked if he would store it. He further testified that it was in storage there at the time of the trial and that he could obtain it for The Fair at any time.

This witness further testified that he purchased the radio a few days before Christmas and he asked the salesman to show him a radio of well known make; that the salesman showed him the set in question and told him it was good; that he, the witness, told the

There was a motion at the close of Minniti's case for a finding in favor of defendants which was denied, and there was a motion by Mrs. Garber for a finding in her favor which was also denied.

Defendant Louis O. Garber testified that he was the same person who had the telephone conversation with Minniti's attorney; that he had never told that attorney he had disposed of the radio nor had he ever promised to pay him on account of it; that he told the attorney that when he purchased the radio it was not connected; that the salesman told him he might have it connected after it was sent to his home and if he did not like it he should notify The Fair, who would call for it and take it back, otherwise defendant could return it.

Mrs. Garber further testified that she had been trying for months and weeks to return the radio to The Fair but it had refused to take it back; that he told the attorney he had been used once before and that at that hearing he had offered to return the radio; that The Fair told him in court that the radio would be picked up; that he told The Fair that it could come and get the radio at any time or that he would deliver the same. Mr. Garber said he did not have the radio in his home at the time of the trial; that he kept it in his house for three years and as Minniti did not call for it, as promised about six months prior to the trial, and not having room in his home for it he took it over to a friend whom he asked if he would store it. He further testified that it was in storage some of the time of the trial and that he could obtain it for The Fair at any time.

This witness further testified that he purchased the radio a few days before Christmas and he asked the salesman to show him a radio of well known make; that the salesman showed him the set in question and told him it was good; that he, the witness, told the

salesman that he had never heard of that model and wanted to buy something like an "RCA"; that the salesman told him that The Fair recommended this set very highly and was sure he would be satisfied with it; that he, the witness, asked the salesman to let him hear it, but as it was not connected the salesman said that if he, defendant, would permit him to send it out to his home, The Fair would install and connect it for \$5 and that inasmuch as he had a charge account he did not need to pay anything if he did not like the set after it was installed; that the salesman further told witness that the set would be picked up and he would not have to pay for it; that he then told the salesman that it was his understanding that if he, witness, would pay the installation charge when the radio was installed, and if he did not like the set, he could call plaintiff up and it would send for it. The witness said that he would make the purchase under those conditions; that the salesman said "All right;" that the radio came to the house and he paid the installation fee; that he kept the radio for about a week and did not like it, that it did not play well at all; that he called up The Fair to take it back but no one came for it; that about two weeks later he went to The Fair and saw the salesman and told him he wanted the radio to be called for; that the salesman asked him if he did not want another radio; that witness said he did not know, and would make a selection, but that in the meantime The Fair should please send for the radio; that he called the salesman the next day and told him the prices he quoted on radios were too high and to please pick up the radio and credit the amount of it to his account; that the salesman promised to do so; that he went down to The Fair at least a dozen times and spoke to the manager of the radio department, the exchange desk and the general manager; that he told all of them if they would ^{not} call for the radio he would bring it back;

of them if they would call for the radio he would bring it back;
next, the exchange desk and the general manager; that he told all
least a dozen times and spoke to the manager of the radio depart-
ment; that he went down to the fair at
the salesman promised to do so; that he went down to the fair at
pick up the radio and credit the amount of it to his account; that
told him the prices he quoted on radios were too high and to please
send for the radio; that he called the salesman the next day and to
make a selection, but that in the meantime the fair should please
not want another radio; that witness said he did not know, and would
the radio to be called for; that the salesman asked him if he did
later he went to the fair and saw the salesman and told him he wanted
fair to take it back but no one came for it; that about two weeks
like it, that it did not play well at all; that he called up the
radio; that he kept the radio for about a week and did not
"All right"; that the radio came to the house and he paid the in-
make the purchase under those conditions; that the salesman said
sit up and it would send for it. The witness said that he would
was installed, and it he did not like the set, he could call plain-
it he, witness, would pay the installation charge when the radio
that he then told the salesman that it was his understanding that
the set would be picked up and he would not have to pay for it;
after it was installed; that the salesman further told witness that
account he did not need to pay anything if he did not like the set
install and connect it for \$5 and that inasmuch as he had a charge
radio, would permit him to send it out to his home. The fair would
it, but as it was not connected the salesman said that if he, be-
with it; that he, the witness, asked the salesman to let him hear
recommended this set very highly and was sure he would be satisfied
something like an "RCA"; that the salesman told him that the fair
salesman that he had never heard of that model and wanted to buy

that they said it was no use for him to bring it back as they would not accept it, nor would they call for it; that these various trips to The Fair took place for about six months; that he either went down to the Fair or spoke to it over the telephone about once a week. He further said that he bought another radio at the expiration of the first week; that he kept the radio in question for almost two years in his house, during which time he tried to get The Fair to pick it up; that about six months ago he had no room for the radio and took it over to a friend and asked him to store it in his place for him.

On cross-examination defendant denied that he told the attorney that he gave the radio to a friend and did not have it. He further said that The Fair sued him once before for the radio two years ago; that there were no storage charges on it.

The daughter of defendants, Peggy Garber, testified that she was present when the radio involved in this suit was purchased by her father; that her father told the salesman he preferred a radio of well known make and the salesman answered that they had one that they were pushing and which he could recommend very highly and that if her father heard it he would be satisfied; that it was not connected and they were unable to have a demonstration of it; that the salesman said they, The Fair, would send it to the house and that if they did not like it after it was connected they could 'phone The Fair, who would come and get it and credit them. She further said, "It was delivered to the house and connected; we did not like it; it did not work right;" that about a week later she and her father went to The Fair and told the salesman they were not satisfied with the radio and he said The Fair would send for it and credit them for it. She said:

"We went down to The Fair on several occasions afterwards; we saw *** the general manager, and we also saw a friend of ours in the adjustment department; we were told that the

that they said it was new for him to claim it back as they would not accept it, nor would they call for it; that there were various trips to the Fair place for about six months; that he either went down to the Fair or spoke to it over the telephone about once a week. He further said that he bought another radio at the expiration of the first week; that he kept the radio in question for almost two years in his house, during which time he tried to get the Fair to pick it up; that about six months ago he had no room for the radio and took it over to a friend and asked him to store it in his place for him.

[illegible]

ON 11/11/54 THE FOLLOWING INFORMATION WAS RECEIVED FROM THE NEW YORK OFFICE OF THE FBI:

salesman did not work there any longer and that they would not take the radio back. The radio remained in our house for about two years; we had it disconnected and never used it after the first week; we could not get The Fair to accept it; we offered to bring it down there but the general manager and all other persons we spoke to said it would be of no use as they would not accept it."

She corroborated the testimony of her father as to the storage of the radio at a friend's house. She said:

"We can give it to them; we can bring it to them or they can pick it up; we can deliver it within one-half hour if they will take it."

There was no cross-examination of this witness. At the close of all the evidence defendants made a motion for a finding in their favor, which was denied. There was a finding and judgment for plaintiff, as we have above set forth.

The parties to this transaction cite many cases as to the propositions of law, but the case appears to turn solely upon issues of fact. It is uncontradicted that defendant Louis G. Garber bought the radio and that it was delivered to him, but his testimony and that of his daughter to the effect that the sale was conditional upon the radio giving satisfaction, and that it did not prove satisfactory, is practically uncontradicted. As against their clear and convincing evidence, the record presents only the testimony of plaintiff's attorney. Benine v. Hardiella, 320 Ill. 181. His testimony as to the telephone conversation concerning alleged admissions by Mr. Garber is vague and indefinite, while that of Mr. Garber and his daughter is clear and complete, and no witness was produced to contradict the material things to which they testified.

The record indicates that this is the second suit and that on a former trial plaintiff took a non-suit. Irrespective of the question whether a radio may be held to be a necessary family expense within the meaning of the statute, the manifest preponderance of the evidence here is to the effect that the pur-

Witness did not work there any longer and that they would not take the radio back. The radio remained in our house for about two years; we had it disconnected and never used it after the first week; we could not get the radio to accept it; we offered to bring it down there but the general manager and all other persons we spoke to said it would be of no use as they would not accept it."

This corroborated the testimony of her father as to the

storage of the radio at a friend's house. She said:

"We can give it to them; we can bring it to them or they can pick it up; we can deliver it within one-half hour if they will take it."

There was no cross-examination of this witness. At

the close of all the evidence defendants made a motion for a finding in their favor, which was denied. There was a finding and judgment for plaintiff, as we have above set forth.

The parties to this transaction also many times as

to the propositions of law, but the case appears to turn solely upon issues of fact. It is uncontested that defendant Lewis G. Garber bought the radio and that it was delivered to him, but his testimony and that of his daughter as to the effect that the radio was conditional upon the radio giving satisfaction, and that it did not prove satisfactory, is practically uncontroverted. As against their clear and convincing evidence, the record presents only the testimony of plaintiff's attorney. Benjamin v. Garfield, 380 Ill. 101. His testimony as to the telephone conversation concerning alleged admissions by Mr. Garber is vague and indefinite, while that of Mr. Garber and his daughter is clear and definite, and no witness was produced to contradict the material things to which they testified.

The record indicates that this is the second trial

and that on a former trial plaintiff took a non-suit. Investigative of the question whether a radio may be held to be a necessary family expense within the meaning of the statute, the manifest preponderance of the evidence here is in the effect that the pur-

chase of the radio in question was conditioned upon its proving satisfactory to the purchaser; that it was not satisfactory and that a salesman of plaintiff agreed that it be taken back, which plaintiff did not do.

For the reasons indicated the judgment of the trial court will be reversed with a finding of facts and judgment here in favor of defendants for costs.

REVERSED WITH A FINDING OF FACTS
AND JUDGMENT HERE IN FAVOR OF
DEFENDANTS FOR COSTS.

O'Conner and McSurely, JJ., concur.

FINDING OF FACTS.

We find as facts that the radio for the purchase price of which plaintiff in this case sues, was sold and delivered by plaintiff to defendant Louis G. Garber upon the express condition that if it proved to be unsatisfactory said Garber might notify plaintiff and plaintiff would take back the radio in full settlement of the transaction; that said radio did prove upon a fair trial to be unsatisfactory to said Garber, and that said Garber within a reasonable time notified plaintiff of that fact and requested plaintiff to take back the radio, which it did not do; that a judgment for costs should be entered in this case in favor of defendants, Louis G. Garber and Mrs. Louis G. Garber, against plaintiff, The Fair, a corporation.

based of the radio in question was conditioned upon its proving satisfactory to the purchaser; that it was not satisfactory and that a salesman of plaintiff agreed that it be taken back, which plaintiff did not do.

For the reasons indicated the judgment of the trial court will be reversed with a finding of facts and judgment here in favor of defendant for costs.

REVERSED WITH A FINDING OF FACTS
AND JUDGMENT HEREIN IN FAVOR OF
DEFENDANT FOR COSTS.

O'Connor and McGee, J.J., concur.

FINDING OF FACTS.

We find as facts that the radio for the purchase price of which plaintiff in this case sued, was sold and delivered by plaintiff to defendant Louis G. Garber upon the express condition that it be proved to be unsatisfactory said Garber might notify plaintiff and plaintiff would take back the radio in full settlement of the transaction; that said radio did prove upon a fair trial to be unsatisfactory to said Garber, and that said Garber within a reasonable time notified plaintiff of such fact and requested plaintiff to take back the radio, which it did not do; that a judgment for costs should be entered in this case in favor of defendant, Louis G. Garber and Mrs. Louis G. Garber, against plaintiff, The Teller, a corporation.

34898

MINNIE C. BUTTS,
Appellee,

vs.

C. A. ERICKSON and CENTRAL
CONTRACTING COMPANY, a Corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

260 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The controversy between plaintiff lesser, Minnie C. Butts, and her tenant, defendant C. A. Erickson, has twice before demanded the attention of this court in general number 34696, Butts v. Erickson, in which an opinion was filed March 2, 1931, and in general number 34697, Butts v. Erickson, in which an opinion is this day filed.

This action also is in the nature of a complaint in forcible entry and detainer which was filed October 21, 1930, and concerns the same premises. In the two prior cases one of the defenses relied on by Erickson was that a corporation known as the Central Contracting Company, of which he is an officer and a director, was in possession of the premises under an assignment of the original lease given him by plaintiff. In this suit plaintiff made the Central Contracting Company a joint defendant and upon trial by the court judgment for possession was entered against both defendants. Upon the trial it developed that defendant Erickson originally held a portion of the premises known as 859 North Clark street, by virtue of an oral lease from plaintiff; that the remainder of the premises described in the bill of complaint was taken by him under a written lease. The premises were joined together as one building and operated by defendants, and the evidence of defendant Erickson shows that as a matter of fact it was usual to give one check for the entire premises.

Defendant Erickson now contends that the Central

MINNIE C. TUTTLE,
Appellee.

APPEAL FROM DISTRICT COURT

OF CHICAGO

C. A. ERIKSON and GRANT
CONTRACTING COMPANY, a Corporation,
Appellants.

230 I.A. 630

MR. PRESIDING JUSTICE PATON
DELIVERED THE OPINION OF THE COURT.

The controversy between plaintiff lessor, Minnie C. Tuttle, and her tenant, defendant C. A. Erikson, has taken before demanded the attention of this court in General number 24323, Tuttle v. Erikson, in which an opinion was filed March 2, 1935, and in General number 24327, Tuttle v. Erikson, in which an opinion in this day filed.

This action also is in the nature of a complaint in forcible entry and detainer which was filed October 21, 1935, and concerns the same premises. In the two prior cases one of the tenants relied on by Erikson was that a corporation known as the Central Contracting Company, of which he is an officer and a director, was in possession of the premises under an assignment of the original lease given him by plaintiff. In this suit plaintiff made the Central Contracting Company a joint defendant and upon trial by the court judgment for possession was entered against both defendants. Upon the trial it developed that defendant Erikson originally held a portion of the premises known as 635 North Clark street, by virtue of an oral lease from plaintiff; that the remainder of the premises described in the bill of complaint was taken by him under a written lease. The premises were joined together as one building and operated by defendant, and the evidence of defendant Erikson shows that as a matter of fact it was usual to give one check for the entire premises.

Defendant Erikson now contends that the Central

Contracting company was not in possession of the premises at the time of the commencement of the action and that the judgment should therefore be reversed as contrary to the weight of the evidence. The principal contention of defendants, however, is that this suit should abate because of the two former suits in which judgments were rendered and which were pending on appeal in the Appellate court at the time this cause was tried. As in the prior case, however, defendants did not comply with rule 12 of the Municipal court with reference to setting up matters in abatement and therefore are in no position to raise the defense here. Moreover, the Contracting company was not a defendant in the other actions. Defendants made a preliminary oral motion to dismiss but afterwards tried the case on the merits, thus waiving the point.

The evidence as to the possession by the Central Contracting company consisted of statements under oath by the agent of plaintiff to the effect that defendant Erickson had informed him of such possession. These admissions were not denied. In view of the former position taken by defendant Erickson, the present contention seems very much like trifling with the court.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Conner and McSurely, JJ., concur.

Contracting company was not in possession of the premises at the time of the commencement of the action and that the judgment should therefore be reversed as contrary to the weight of the evidence. The principal contention of defendants, however, is that this suit should stand because of the two former suits in which judgments were rendered and which were pending on appeal in the appellate court at the time this cause was tried. As in the prior case, however, defendants did not comply with rule 13 of the Municipal Court with reference to setting up matters in abatement and therefore are in no position to raise the defense here. Moreover, the Contracting company was not a defendant in the other actions. Defendants made a preliminary oral motion to dismiss but afterwards tried the case on the merits, thus waiving the point. The evidence as to the possession by the Contracting Company consisted of statements under oath by the agent of plaintiff to the effect that defendant Erickson had informed him of such possession. These statements were not denied. In view of the former position taken by defendant Erickson, the present contention seems very much like trifling with the court. For the reasons indicated the judgment is affirmed.

ATTORNEYS

34960

MILDRED R. BORRE,
Appellee.

vs.

ANTHONY J. BORRE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 630²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Complainant, Mildred R. Borre, filed her bill November 6, 1929, in which she averred that she was married to defendant, Anthony J. Borre, April 3, 1929; that they lived together from that time until October 1, 1929; that defendant was guilty of extreme and repeated cruelty in that on September 4th and 18th, 1929, he choked, beat, slapped, struck and kicked her. She prayed for a divorce. Defendant answered, admitting his marriage; denying all acts of cruelty; admitting, however, that on one occasion he had a slight quarrel with complainant when he pushed her against the bed but did not hurt or injure her. His answer averred that he lived with complainant until October 3, 1929, when without notice she took all their furniture and household goods and went to her mother; that the furniture cost \$1300, and that they had a joint bank account of \$300 which she appropriated when she left.

The chancellor heard the evidence, found the jurisdictional facts as to residence, etc., found that defendant was guilty as charged and entered a decree as prayed. The decree gave to complainant the custody of their one child, then five months old.

Defendant has perfected this appeal and argues that the court erred in receiving hearsay evidence and that the proof shows, admitting defendant was guilty of cruelty, that complainant condoned any offenses of which he may have been guilty in that respect.

Complainant testified in her own behalf as to the acts of cruelty, the last one of which she said occurred September 18,

MICHAEL A. BORNE,
Appellant.

ANTHONY J. BORNE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

24980 I.A. 280

MR. JUSTICE OF THE PEACE
DELIVERED THE OPINION OF THE COURT.

Complainant, Michael A. Borne, filed her bill November 6, 1937, in which she averred that she was married to defendant, Anthony J. Borne, April 3, 1930; that they lived together from that time until October 1, 1937; that defendant was guilty of extreme and repeated cruelty in that on September 28 and 29, 1937, he choked, beat, slapped, struck and kicked her. She prayed for a divorce. Defendant answered, admitting his marriage; denying all acts of cruelty; admitting, however, that on one occasion he had a slight quarrel with complainant when he punched her against the bed but did not hurt or injure her. His answer averred that he lived with complainant until October 1, 1937, when without notice she took all their furniture and household goods and went to her mother; that the furniture cost \$1800, and that they had a joint bank account of \$500 which was appropriated when she left. The chancellor heard the evidence, found the testimony of complainant to be true, and that defendant was guilty as charged and entered a decree as prayed. The decree gave to complainant the custody of their one child, then five months old. Defendant has petitioned this appeal and argued that the court erred in receiving hearsay evidence and that the proof shows admitting defendant was guilty of cruelty, that complainant continued any offense of which he may have been guilty in that respect. Complainant testified in her own behalf as to the acts of cruelty, the last one of which she said occurred September 18,

1929. She was corroborated in these respects by the testimony of her mother and a sister, both of whom said that they had seen marks upon her body tending to show violence at the time that complainant says the acts in question took place. These witnesses testified further to what complainant told them, (which was mere hearsay, but the chancellor, it will be presumed, disregarded any incompetent evidence which was heard.)

As to the acts of cruelty, defendant said he never beat, bruised, struck or kicked complainant, but that on one occasion (when he asked her where she had been while away from home and she refused to answer) he became angry and says he pushed her backwards and she fell on the bed. He also admitted that he used obscene and opprobrious language towards her but said he did not remember the particular words he used.

The contention upon which defendant relies is that a preponderance of the evidence shows that complainant condoned any of these offenses. As we have already stated, the last offense was said to have taken place September 18th and complainant admitted she did not leave the home until October 2nd, which was fourteen days thereafter. Defendant said that he had intercourse with her every night during that time. She said that she continued to live in the same house with him after September 18th because she was pregnant and had no other place to which she might go or live. She denied having had any intercourse with him after September 18th and said that she told him that she never could forgive him for striking her so many times and that she was going to leave him as soon as she could find another place to live.

He is 24 years of age, she is 22. The evidence as to their relationship during the days that she remained in his home after the last offense is meager indeed, and consists of his

1932. She was corroborated in these respects by the testimony of her mother and a sister, both of whom said that they had seen marks upon her body leading to what complaint says the case in question took place. These witnesses testified further to what complaint said them, (which was more hearsay, but the statement, it will be observed, is regarded any independent evidence which was heard.)

As to the acts of cruelty, defendant said he never beat, bruised, struck or kicked complaint, but that on one occasion (when he asked her where she had been while away from home and she refused to answer) he became angry and says he pushed her backward and she fell on the bed. He also admitted that he used obscene and vulgar language towards her and said he did not remember the particular words or words.

The contention upon which defendant relies is that a preponderance of the evidence tends to show that defendant committed any of these offenses. As we have already stated, the last offense was said to have taken place on October 19th and defendant admitted that she did not leave the home until October 2nd, which was fourteen days earlier. Defendant said that he had intercourse with her every night during that time. He said that she continued to live in the case house with him after September 18th because she was pregnant and had no other place to which she might go or live. The United States Attorney has returned for him after September 18th and said that she said she did not leave after he told her to go. He said that he was sorry for striking her so many times and that he was going to leave her as soon as she could find another place to live.

He is 24 years of age, and is a white man. The witness as to their relationship during the day that the woman in the home after the last offense is mother, indeed, and consorts of him.

assertion and her denial. Persons who are married and who reside under the same roof are, of course, presumed to maintain the relationship which is usual under the circumstances. The presumption on the facts which here appear is in favor of the indulgence to which defendant testified. Complainant's explanation for remaining after September 18th is hardly consistent with the facts which appear. She said she did not know where to go, but when she left she went to the home of her mother, which was near, and when she went there she was apparently welcome. There is nothing in the evidence to indicate that a different reception would have awaited her at an earlier date and immediately after the cruelty to which she testified.

As we have already stated, the testimony upon the crucial question at issue is meager indeed. Circumstances of the utmost importance are not related. Complainant and defendant were under the same roof. The testimony does not show whether in fact they occupied the same bed. If so, her testimony in denial would be improbable. This important question was not asked either by counsel in the case or by the court, nor is the fact in relation thereto stated by either of the parties.

Again, complainant's bill, filed November 6, 1929, makes this averment: "Your oratrix and the said defendant lived and cohabited together as man and wife from the time of said marriage until on or about the 1st day of October, 1929." This bill is verified by an affidavit of complainant which states that "she has read the same and knows the contents thereof, and that the same is true."

The certificate of evidence does not disclose a most important fact, namely, the exact date upon which the child was born. The decree of divorce was entered October 20, 1930, and this decree finds that "one child, Susanna, was born of said

assertion and her denial. Persons who are married and who reside under the same roof are, of course, presumed to maintain the relationship which is usual under the circumstances. The presumption on the facts which were before is in favor of the inducement to which defendant testified. Defendant's explanation for remaining after September 19th is hardly consistent with the facts which appear. She said she did not know where to go, but when she left she went to the home of her mother, which was near, and when she went there she was apparently welcome. There is nothing in the evidence to indicate that a different reception would have awaited her at an earlier date and immediately after the cruelty to which she testified.

As we have already stated, the testimony upon the

crucial question of issue is meager indeed. Circumstances of the utmost importance are not related. Complaint and defendant were under the same roof. The testimony does not show whether in fact they occupied the same bed. If so, her testimony in denial would be incredible. This important question was not asked either by counsel in the case or by the court, nor is the fact in relation thereto stated by either of the parties.

Again, complainant's bill, filed November 8, 1909,

makes this averment: "Your clerk and the said defendant lived and cohabited together as man and wife from the time of said marriage until on or about the 1st day of October, 1909." This bill is verified by an affidavit of complainant which recites that "she has read the case and knows the contents thereof, and that the same is true."

The certificate of evidence does not disclose a most important fact, namely, the exact date upon which the said case was entered. The decree of divorce was entered October 20, 1909, and this decree finds that "one child, Suzanne, was born of said

marriage, now five months old." If we assume this finding to be correct, the child was born on the 20th day of May, 1930, which would be seven months and eighteen days after the time when complainant departed from the home. The exact date of the birth of the child becomes of great importance in determining the truth as between the contradictory testimony of the parties.

Under all the circumstances which appear, his testimony seems much more probable than hers. Of course, as to the issue of condonation, the burden of proof was upon him in the first instance, but the fact that she stayed under the same roof with her husband without any other fact to explain it would seem to shift the burden of proof to her. He says, "Yes." She says, "No." Neither presents a fact to corroborate the other, except as we have already set forth. The parties to this suit are young folks and the child is theirs. Public interest, as well as that of all the parties, would seem to demand another trial of this cause in which the actual facts may be ascertained. For that reason the decree of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

marriage, now five months old." If we assume this finding to be correct, the child was born on the 20th day of May, 1930, which would be seven months and eighteen days after the time when complainant departed from the home. The exact date of the birth of

the child becomes of great importance in determining the truth as between the contradictory testimony of the parties.

Under all the circumstances which appear, his testi-

mony seems much more probable than hers. Of course, as to the issue of condemnation, the burden of proof was upon him in the first instance, but the fact that she stayed under the same roof with her husband without any other fact to explain it would seem to shift the burden of proof to her. He says, "Yes." She says,

"No." Neither presents a fact to corroborate the other, except as we have already said. The parties to this suit are young folks and the child is theirs. Public interest, as well as that of all the parties, would seem to demand another trial of this cause in which the actual facts may be ascertained. For that reason the decree of the Superior court is reversed and the cause is remanded.

REVEREND AND HONORABLE.

O'Connor and McGarry, JJ., concur.

35013

CARRIE M. WRIGHT,
Appellee.

vs.

CHARLES O. WRIGHT,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 630³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order of the Superior court by which he was committed to the common jail of Cook county for a period not to exceed six months or until he should pay to complainant, or to the sheriff of Cook county for her use, the sum of \$192.50.

The facts disclosed by the record are that complainant and defendant were formerly husband and wife; that on March 8, 1928, complainant filed a bill for separate maintenance against defendant in which she alleged their marriage on January 8, 1905, and that they had lived together until March 8, 1928, when she was compelled to abandon him. The bill also alleged that several children were born, three of whom - Ralph, 17, Caroline, 15, and Jack, 12 years of age - were then living. The bill charged extreme and repeated cruelty and prayed for separate maintenance and for the support of the children.

March 25, 1928, complainant filed an amended bill charging cruelty and praying for a divorce and alimony. A decree for divorce was entered April 5, 1930. It recited that by agreement of the parties the cause was heard on the amended bill of complaint and on defendant's answer; that complainant had been an actual resident of Cook county, Illinois, for more than one year before the filing of the bill; that complainant and defendant were married at Hot Springs, Arkansas, January 8, 1905; that defendant was guilty of extreme and repeated cruelty as charged in

CARRIE M. WRIGHT,
Appellee.

CHARLES O. WRIGHT,
Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

280 I.A. 630

MR. PRESIDING JUSTICE MATHEW
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order of the

superior court by which he was committed to the common jail of

Cook county for a period not to exceed six months or until he

should pay to complainant, or to the sheriff of Cook county for

her use, the sum of \$100.00.

The facts disclosed by the record are that complain-

ant and defendant were formerly husband and wife; that on March

8, 1928, complainant filed a bill for separate maintenance against

defendant in which she alleged their marriage on January 8, 1908,

and that they had lived together until March 8, 1928, when she

was compelled to abandon him. The bill also alleged that several

children were born, three of whom - Ralph, IV, Caroline, IV, and

Jack, 12 years of age - were then living. The bill charged extreme

and repeated cruelty and prayed for separate maintenance and for

the support of the children.

March 22, 1928, complainant filed an amended bill

charging cruelty and praying for a divorce and alimony. A decree

for divorce was entered April 2, 1928. It recited that by agree-

ment of the parties the cause was heard on the amended bill of com-

plaint and on defendant's answer; that complainant had been an

actual resident of Cook county, Illinois, for more than one year

before the filing of the bill; that complainant and defendant

were married at Hot Springs, Arkansas, January 8, 1908; that de-

fendant was guilty of extreme and repeated cruelty as charged in

the amended bill of complaint; that the cross-bill of defendant was without equity and should be dismissed. The decree ordered the marriage between the parties to be dissolved; gave to complainant the care and custody of the three children; provided that defendant should support complainant and the two younger children, and that he should pay \$20 a week for the support and education of the said children until they reached their legal age or until the further order of the court.

The decree also found that defendant was in arrears in alimony payments upon an order of court theretofore entered in the sum of \$155.25, at the rate of \$2.50 a week, which sum should be paid in addition to the \$25 a week ordered to be paid by the decree; that defendant should pay complainant \$150 for solicitor's fees, and that the parties had agreed that the payments of \$25 a week should be paid to the Social Service Bureau of Cook county.

October 6, 1930, pursuant to notice, defendant filed a petition praying for a modification of the decree. The petition averred that defendant had been directed to pay solicitors' fees of \$150, which he had paid; that there was a further order to pay \$27.50 a week to complainant for alimony and for the support of the three children; that defendant was 57 years of age and in feeble health; that he was unable to earn an income sufficient to pay the sums directed by the decree; that his total net income was less than \$125 each month, and from this he had to feed and clothe himself and keep himself in as good physical condition and health as possible in order to be able to earn even that sum of money. He prayed that the decree might be modified and that the sum which he was ordered to pay be reduced to a reasonable amount. The petition also recited that at another time he had been in arrears in the sum of \$137.50; that he had been adjudged in contempt of court and ordered sent to jail for six months or until he paid that amount;

the amended bill of complaint; that the cross-bill of defendant was without equity and should be dismissed. The decree ordered the marriage between the parties to be dissolved; gave to complainant the care and custody of the three children; provided that defendant should support complainant and the two younger children, and that he should pay \$20 a week for the support and education of the said children until they reached their legal age or until the further order of the court.

The decree also found that defendant was in arrears in alimony payments upon an order of court theretofore entered in the sum of \$168.25, at the rate of \$2.50 a week, which sum should be paid in addition to the \$25 a week ordered to be paid by the decree; that defendant should pay complainant \$100 for solicitor's fees, and that the parties had agreed that the payments of \$25 a week should be paid to the Social Service Bureau of Cook County. October 6, 1920, pursuant to notice, defendant filed a

petition praying for a modification of the decree. The petition averred that defendant had been directed to pay solicitor's fees of \$100, which he had paid; that there was a further order to pay \$25.00 a week to complainant for alimony and for the support of the three children; that defendant was 37 years of age and in feeble health; that he was unable to earn an income sufficient to pay the sums directed by the decree; that his total net income was less than \$125 each month, and from this he had to feed and clothe himself and keep himself in as good physical condition and health as possible in order to be able to earn even that sum of money. He prayed that the decree might be modified and that the sum which he was ordered to pay be reduced to a reasonable amount. The petition also recited that at another time he had been in arrears in the sum of \$137.50; that he had been adjudged in contempt of court and ordered sent to jail for six months or until he paid that amount;

that some of his friends, rather than see him suffer imprisonment, had loaned him money wherewith to pay, for which he was still indebted.

On the same day complainant filed her petition, which recited the terms of the decree entered April 5, 1930, and averred that defendant was a chiropractor and was also engaged in operating a watch service and in the sale of certain medicine; that he had an income large enough to enable him to easily pay the sums ordered by the court; that he had been on August 6, 1930, ordered committed to the common jail of Cook county for refusal to pay \$137.50 then due; that he was committed to jail at 12:30 p. m. on that day and that at 2 o'clock p. m., he paid the sum in full; that defendant was again in arrears in the sum of \$247.50; that he made it necessary for complainant to employ counsel; that he wilfully refused to comply with the decree in the hope that he might "slowly wear and grind out the patience of your petitioner." The petition averred that defendant "being not only an old, but a continuing offender," should be compelled to pay a sufficient sum necessary to enforce the orders of the court and that complainant had no separate funds of her own. The prayer of the petition was for a rule to shew cause why defendant should not be punished for contempt of court for wilfully failing to comply with the orders of court.

An order to show cause was entered, and a hearing was had upon defendant's petition as well as on that of complainant. Upon that hearing the court entered an order of commitment, as hereinbefore set forth.

The sole question for determination on this appeal is whether the court abused its discretion. The rules applicable to a proceeding such as this are well settled. Upon proof that a defendant has not paid alimony provided by a decree of divorce,

that some of his friends, whom he had seen at his apartment, had loaned him money whenever he was still

indebted.

On the same day complainant filed her petition, which recited the terms of the decree entered April 5, 1930, and averred that defendant was a chiropractor and was also engaged in operating a watch service and in the sale of certain medicines; that he had an income large enough to enable him to easily pay the sums ordered by the court; that he had been on August 5, 1930, ordered committed to the common jail of Cook County for refusal to pay \$127.50 then due; that he was committed to jail at 12:30 p. m. on that day and that at 3 o'clock p. m., he paid the sum in full; that defendant was again in arrears in the sum of \$247.50; that he made it necessary for complainant to employ counsel; that he willfully refused to comply with the decree in the hope that at night "always wear and grind out the contents of your petition." The petition averred that defendant "being not only an old, but a cunning offender," should be compelled to pay a sufficient sum necessary to enforce the orders of the court and that complainant had no separate funds of her own. The prayer of the petition was for a rule to show cause why defendant should not be ordered for contempt of court for willfully failing to comply with the orders of court.

An order to show cause was entered, and a hearing was had upon defendant's petition as well as on that of complainant. Upon that hearing the court entered an order of commitment, and thereupon set forth.

The sole ground for the application on this appeal is whether the court abused its discretion. The rules applicable to a proceeding such as this are well settled. Upon proof that a defendant has not paid alimony provided by a decree of divorce,

the burden of proof is cast upon him to prove to the satisfaction of the court that the failure to pay is not wilful and contumacious. Shaffner v. Shaffner, 212 Ill. 492; Hengen v. Hengen, 271 Ill. 278. On the other hand, where it is made to appear that a defendant is unable pecuniarily to pay, that such inability has not resulted from his fraudulent conduct, and that he has acted in good faith and has no property or means by which he can comply with the decree; upon such a showing the rule should be discharged. Such have been the uniform holdings of this court and the Supreme court in cases which defendant cites and upon which he relies. McSherry v. McSherry, 49 Ill. App. 90; Scheule v. Scheule, 87 Ill. App. 189; Kadlowsky v. Kadlowsky, 63 Ill. App. 392; O'Callaghan v. O'Callaghan, 69 Ill. 552; Black v. People, 80 Ill. 11; and Shaffner v. Shaffner, 212 Ill. 492, and Hengen v. Hengen, 271 Ill. 278, above cited.

In this case upon the hearing, in response to the rule the court heard defendant and Ralph Wright, the only witnesses, and the testimony is preserved by certificate. Defendant testified that his income came principally from the massage business conducted by him; that he also conducted a night watch service and had two men working under his direction as night watchmen, one of whom worked only half time; that sometimes he had two or three men working for him; that that business brought him about \$435 a month gross, out of which one man received \$30 a week and the other man \$15 a week; that all of his people did not pay him every month; that "some of the accounts are six months in arrears;" that during the last month he actually received \$200 net and not over that the month before; that on the prior hearing when he was committed to jail, he borrowed the money wherewith to pay the alimony in arrears from a lodge brother; that he had not paid that money back; that on seven different dates mentioned since the entry of the order he had paid to complainant \$27.50. He said, "I have no

the burden of proof is cast upon him to prove to the satisfaction
of the court that the failure to pay is not willful and contumacious.
Shallan v. Shaller, 218 Ill. 482; Shallen v. Shallen, 221 Ill. 728.
On the other hand, where it is held to appear that a defendant is
unable pecuniarily to pay, that such inability has not resulted from
his fraudulent conduct, and that he has acted in good faith and
has no property or means by which he can comply with the decree;
when such a showing the rule should be disregarded. Such have
been the uniform holdings of this court and the supreme court in
cases which defendant relies upon and upon which he relies. McCarthy
v. McCarthy, 48 Ill. App. 90; Shallen v. Shallen, 221 Ill. App. 189;
Kadinsky v. Kadinsky, 87 Ill. App. 282; Shallen v. Shallen, 221 Ill. App. 189;
82 Ill. 528; Shallen v. Shallen, 221 Ill. App. 189; Shallen v. Shallen, 221 Ill. App. 189;
221 Ill. 482, and Shallen v. Shallen, 221 Ill. App. 189, above cited.
In this case upon the facts, it remains to the
rule the court found that the defendant, the only witness,
and the testimony is preserved by certification. Defendant testi-
fied that his income came principally from the business conducted
conducted by him; that he also conducted a night watch service and
had two men working under his direction as night watchmen, one of
whom worked only half time; that defendant is paid for the work
working for him; that the business brought him about \$400 a month
gross, out of which one was retained for a week and the other man
\$10 a week; that all of his people did not go in very many;
that "some of the associates are six months in arrears;" that during
the last month he actually received \$200 not more and over that the
month before; that on the prior month when he was compelled to
fail, he borrowed the money wherever to pay the money in ar-
rears from a friend; that he had not paid any money for
that on seven different dates cancelled since the day of the
order he had sent to defendant 221 Ill. App. 189, he had no

money and I have no property."

He further testified that complainant was operating a sanitarium in Denver. A letter from the City and County of Denver Health Department was offered in evidence, indicating that defendant's wife was a nurse and that she was not suffering from tuberculosis. Defendant also said that the watch service was his principal business; that as to the massage business he did a little of that where he lived; that he paid a rental of \$70 a month and \$4 for telephone; that he had an automobile which he used for business and for pleasure; that he owns a massage business in Joliet where he pays \$40 a month rent and \$30 a month for telephone; that he pays \$7 a month for a garage; that he eats fifty cent dinners, fifteen cent breakfasts - sometimes twenty-five cent ones; that the condition of his health is not good but he keeps on working and takes medicine all the time; that he prepared a statement showing receipts and disbursements of his business for the last three months; this statement was received in evidence as Exhibit "E." It shows an average monthly income from the massage business in Joliet of \$60, from the massage business in Chicago of \$160; a total monthly income from the massage business of \$240 (evidently a miscalculation); a total income from the watch service of \$209.50; a total income from all sources monthly of \$455.50; a total expense monthly of \$467.00, leaving a deficit of \$11.50.

Defendant also produced a statement (which he said was true and correct) as to the customers who had not paid him for the watch service, and it was received in evidence as Exhibit "C." Defendant further stated that he had sub-rented a greater part of the house he lived in to a woman and her son, who paid him \$50 a month, leaving \$20 a month of rent for him to pay.

Ralph Wright, the son of defendant, testified that when he was at home collecting on the night service for defendant, who

money and I have no property."

He further testified that complainant was operating a restaurant in Denver. A letter from the City and County of Denver Health Department was offered in evidence, indicating that defendant's wife was a nurse and that she was not suffering from tuberculosis. Defendant also said that the witness never was his principal business; that as to the massage business he did a little of that where he lived; that he paid a rental of \$70 a month and \$4 for telephone; that he had an automobile which he used for business and for pleasure; that he owns a massage business in Joliet where he pays \$40 a month rent and \$30 a month for telephone; that he pays \$7 a month for a garage; that he eats fifty cent dinners, fifteen cent breakfasts - sometimes twenty-five cent ones; that the condition of his health is not good but he keeps on working and takes medicine all the time; that he executed a statement swearing to receipts and disbursements of his business for the last three months; this statement was received in evidence as Exhibit "B". It shows an average monthly income from the massage business in Joliet of \$60, from the massage business in Chicago of \$160; a total monthly income from the massage business of \$220 (evidently a misstatement); a total income from the watch service of \$200.00; a total income from all sources monthly of \$420.00; a total expense monthly of \$467.00, leaving a deficit of \$47.00.

Defendant also produced a statement (which he said was true and correct) as to the statements who had not paid him for the watch service, and it was received in evidence as Exhibit "C". Defendant further stated that he had submitted a greater part of the house he lived in to a woman and her son, who paid him \$50 a month, leaving \$50 a month of rent for him to pay.

Ralph Wright, the son of defendant, testified that when he was at home collecting on the night service for defendant, who

had three men working for him, defendant never paid any of the men over \$15 a week; that defendant had a massage business at home and sold medicine, and that he used to come from his place in Joliet and carried plenty of money; that when his mother was sick in Chicago his father wanted to send her to the County hospital; that he, the witness, understood from letters received from his mother that she was then sick but he admitted that it was true that the printed letterhead of the sanitarium contained the name of his mother as one of the operators. Defendant was again called and testified that he did not have any money.

In view of the fact that the burden of proof is upon defendant to show inability to pay, we think the proof which has just been recited is entirely too general, indefinite and uncertain for us to find therefrom that the court, who saw defendant and heard him testify, abused his discretion in refusing to discharge the rule and in holding defendant guilty of contempt. There is no proof anywhere in this record as to how much money, if any, defendant has in the bank. There is no proof of what personal property may be owned by him. There is no proof whether he does or does not own any real estate or whether he receives any rents therefrom. Every presumption, of course, is in favor of the decree. We must assume that it is just and correct, and that presumption in its favor remains until it is overcome by clear and convincing testimony. Defendant could not overcome that presumption by proof of a deficiency in his net income for the three months last past. In Hinz v. Hinz, 254 Ill. App. 615, reported only by abstract, under somewhat similar circumstances we said:

"Petitioner made proof of his income for only three months. This would hardly seem to be sufficient to show such a permanent change in his financial condition as would justify a further modification of the decree. His testimony is in many respects vague and uncertain in view of the nature of the proceedings.

had three men working for him, defendant never said any of the men
over his a week; that defendant had a massage business at home
and sold medicine, and that he used to come from his place in
Joliet and carried plenty of money; that when his mother was sick
in Chicago his father wanted to send her to the County Hospital;
that he, the witness, understood from letters received from his
mother that she was then sick but he admitted that it was true that
the printed letterhead of the sanitarium contained the name of his
mother as one of the operators. Defendant was again asked and
testified that he did not have any money.

In view of the fact that the burden of proof is upon
defendant to show inability to pay, we think the proof which has
just been recited is entirely too general, indefinite and uncertain
for us to find therefrom that the court, who saw defendant and heard
him testify, abused his discretion in refusing to discharge the
wife and in holding defendant guilty of contempt. There is no proof
anywhere in this record as to how much money, if any, defendant has
in the bank. There is no proof of what personal property may be
owned by him. There is no proof whether he does or does not own any
real estate or whether he receives any rents therefrom. Every pre-
sumption, of course, is in favor of the decree. We must assume that
it is just and correct, and that presumption in its favor remains
until it is overcome by clear and convincing testimony. Defendant
could not overcome that presumption by proof of a delinquency in his
net income for the three months last past. In King v. King, 258
Ill. App. 615, reported only by abstract, under somewhat similar
circumstances we said:

"Petitioner made proof of his income for only three months.
This would hardly seem to be sufficient to show such a permanent
change in his financial condition as would justify a further
modification of the decree. His testimony is in many respects
vague and uncertain in view of the nature of the proceedings."

He does not state whether he owns real estate nor whether any real or personal property is held in trust for him.

It would seem that in fairness and justness the relief which petitioner asks would demand as full and complete disclosure as a bankrupt asking to be discharged from his debts would be required to make. Petitioner is not precluded from making a further showing."

The same ruling is applicable to the facts which here appear. This court would not be justified in finding on this record that the chancellor abused his discretion.

The order is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

He does not state whether he owns real estate nor whether any real or personal property is held in trust for him. It would seem that in Latham and Latham the relief which petitioner asks would demand an full and complete disclosure as a bankruptcy would to be discharged from his debts would be required to make. Petitioner is not prevented from making a further showing.

The same ruling is applicable to the facts which have

appear. This court would not be justified in finding on this record that the chancellor abused his discretion. The order is therefore affirmed.

AFFIRMED.

O'Connor and McHenry, JJ., concur.

34726

1057
IGNATZ SZOPIŃSKI,
Appellee,

vs.

HELEN KLASNJA,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 630⁴

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover for damages to his automobile by a collision between it and an automobile alleged to belong to defendant, had judgment upon trial by the court for \$300. The action was originally brought against defendant Helen Klasnja and her son, Mike, but the latter was dismissed from the case.

The evidence shows that at the time of the accident defendant's car was driven by her son, Mike, twenty years of age or younger. Defendant was not present. Mike Klasnja testified that he was using the car without the knowledge or permission of his mother and was on his way, when the accident happened, to meet his "girl." He also testified that he was not allowed to use the car at any time without permission from either his father or mother.

One of the points made by defendant upon this appeal is that she is not liable for the negligent driving of the automobile by her minor child. The well known cases of Arkin v. Page, 287 Ill. 420; Graham v. Page, 300 Ill. 40; Gates v. Mader, 316 Ill. 313, and others are discussed by both sides. The last word on this point is the opinion in White v. Seitz, 342 Ill. 266, where the Supreme court, after giving consideration to the conflicting decisions on this question, holds to the proposition that where a minor child is using a car exclusively for his own purposes of pleasure or

APR 11 1934

OF CHICAGO

IGORAT GEORGINA, Appellee,

vs.

HELEN ALAN, Appellant.

MR. JUSTICE ROBERTSON delivered the opinion of the court.

Plaintiff, bringing suit to recover for damages to his automobile by a collision between it and an automobile alleged to belong to defendant, had judgment upon trial by the court for \$300. The action was originally brought against defendant Helen Alana and her son, Alex, but the latter was dismissed from the case.

The evidence shows that at the time of the accident defendant's car was driven by her son, Alex, twenty years of age or younger. Defendant was not present. Alex Alana testified that he was using the car without the knowledge or permission of his mother and was on his way when the accident happened, to meet his "girl." He also testified that he was not allowed to use the car at any time without permission from either his father or mother.

One of the points made by defendant upon this appeal is that she is not liable for the negligent driving of the automobile by her minor child. She well knows cases of Smith v. State, 287 Ill. 480; Grimes v. State, 3 Ill. 40; Miller v. State, 310 Ill. 303, and others are discussed by both sides. The first two on this point is the opinion in White v. State, 343 Ill. 303, where the Supreme court after giving consideration to the conflicting decisions on this question, holds in the proposition that where a minor child is using a car exclusively for his own purposes or otherwise or

business the parent cannot be held liable for his negligent driving. It follows, therefore, that the instant judgment must be reversed and as under the undisputed facts there can be no recovery, it will not be remanded.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

FINDING OF FACT.

We find as a fact that defendant's automobile at the time of the accident in question was driven by her minor son without her knowledge or consent and exclusively for his own purposes of business or pleasure.

business the patent cannot be held liable for his negligent driving. It follows, therefore, that the instant judgment must be reversed and as under the undisputed facts there can be no recovery, it will not be remanded.

REVEREND.

Matchett, P. J., and O'Connor, J., concur.

FINDING OF FACT.

We find as a fact that defendant's automobile at the time of the accident in question was driven by her minor son without her knowledge or consent and exclusively for his own purposes of business or pleasure.

34862

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

GEORGE MCGINNIS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 630⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, charged with unlawfully carrying a concealed weapon on or about his person, upon trial by the court was found guilty and sentenced to confinement in the House of Correction of Chicago for one year and fined \$300.

A number of reversible errors occurred upon the trial, but we shall note only one. A police officer testified that he had chased and caught the defendant in a Chrysler sedan. Defendant was sitting in the front seat driving the car. The officer found the revolver under the back seat of the automobile. The officer said he did not know how far defendant was from the gun. In The People v. Kiewoth, 322 Ill. 51, it was held under similar circumstances that, there being no proof that the guns belonged to the accused or that he knew they were in the automobile and the evidence showing that they were not in such proximity to the accused as to be within his easy reach and under his control, the evidence did not establish his guilt. See also The People v. Lake, 332 Ill. 617. Following the decisions in these cases the instant judgment cannot stand and it is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

PROSECUTOR OF THE STATE OF ILLINOIS
 Defendant in Error.

VERNON TO MUNICIPAL COURT

OF CHICAGO.

GEORGE ROBINSON,
 Plaintiff in Error.

200 A. 330

MR. JUSTICE MCKINNEY DELIVERED THE OPINION OF THE COURT.

Defendant, charged with unlawfully carrying a concealed weapon on or about his person, upon trial by the court was found guilty and sentenced to confinement in the House of Correction of Chicago for one year and fined \$300.

A number of reversible errors occurred upon the trial. but we shall note only one. A police officer testified that he had chased and caught the defendant in a Chrysler sedan. Defendant was sitting in the front seat driving the car. The officer found the revolver under the back seat of the automobile. The officer said he did not know how far defendant was from the gun. In The People v. Mikolich, 232 Ill. 51, it was held under similar circumstances that, there being no proof that the gun belonged to the accused or that he knew they were in the automobile and the evidence showing that they were not in such proximity to the accused as to be within his easy reach and under his control, the evidence did not establish his guilt. See also The People v. Lake, 232 Ill. 517. Following the decision in these cases the instant judgment cannot stand and it is therefore reversed and the same remanded.

REVERSED AND REMANDED.

34875

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EDWARD SEMMLER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 631

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Upon trial by the court defendant was found guilty of violating the act commonly known and designated as an act to prohibit book-making and pool selling and fined \$50. No testimony was offered on behalf of defendant.

The first point made is that the information is defective in that it does not negative the exception provided in the statute which removes the operation of the act from the enclosure of race track associations. The statute is in Chapter 38, paragraph 316, section 1, Illinois Statutes, Cahill. After setting forth the details of the offense and the punishment, there is a proviso to the effect that the provisions of this act shall not apply to the actual enclosure of fair or race track associations incorporated under the laws of the state during the actual time of the meetings of said associations or within twenty-four hours before such meetings.

In determining whether or not an exception or proviso in a statute must be negated in an indictment or information, the real question is whether the exception or proviso is so incorporated with the substance of the definition of the offense as to constitute a material part of the description of the offense. The People v. Barnes, 314 Ill. 140. If the exception or proviso is in a subsequent clause or in the same one but not incorporated within the enacting clause by any words of reference, it need not be negated

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EDWARD KEMMLER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

2001 A. 681

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

Upon trial by the court defendant was found guilty of

violating the act commonly known and designated as an act to pro-
hibit book-making and pool selling and fined \$50. His testimony
was offered on behalf of defendant.

The first point made is that the information is de-

fective in that it does not negative the exception provided in the
statute which removes the operation of the act from the embrace
of race track associations. The statute is in Chapter 38, paragraph

316, section 1, Illinois Statutes, which, after setting forth

the details of the offense and the punishment, there is a provision

to the effect that the provisions of this act shall not apply to

the actual occurrence of fair or race track associations incorporated
under the laws of the state during the actual time of the meeting
of said associations or within twenty-four hours before such meet-

ings.

In determining whether or not an exception or provision

in a statute must be negated in an indictment or information, the

real question is whether the exception or provision is so incorporated
with the substance of the definition of the offense as to constitute

a material part of the description of the offense. The People v.

Belmont, 314 Ill. 140. If the exception or provision is in a substan-

stant clause or in the same one but not incorporated within the

connecting clause by any words of reference, it need not be negated

but is a mere matter of defense. Sokol v. The People, 212 Ill. 238. See also The People v. Montgomery, 271 Ill. 580; Swigart v. The People, 154 Ill. 234. Where it has been held that a negative averment must be included in the indictment, it has been upon the ground that the exception was a necessary ingredient of the crime. Such cases are The People v. Martin, 314 Ill. 110; The People v. Talbot, 322 Ill. 416.

The statute under consideration comes under the rule stated in The People v. Barnes, 314 Ill. 140. The exception stated in the proviso is no part of the offense and is simply a provision that the act shall not apply to the actual enclosure of fair or race track associations under certain circumstances.

The instant information specifically describes the premises as "128 S. Canal Street," in the City of Chicago, County of Cook and State of Illinois, and the evidence indicates that the front part of the premises was a barber shop.

It is next contended that the information states no offense, in that it fails to allege that defendant kept a book, instrument or device. Comparing the language of the information with the section of the statute shows that the information virtually follows the language of the statute in every essential respect. The information charged that defendant kept a certain room "with a certain book and instrument known as a book, said book then and there being kept for the purpose of registering bets." The statute provides punishment for any person "who keeps any room *** or any part thereof *** with any book, instrument or device for the purpose of recording or registering bets." The point of defendant's criticism seems to be that the information fails to specifically allege that defendant kept a book. We hold that the information sufficiently charges the keeping of a room with a book, which is the language of the statute.

room with a book, which is the language of the statute. He held that the information sufficiently charged the keeping of a book to specifically allege that defendant kept a book. We point of defendant's stipulation seems to be that the information device for the purpose of recording or registering data. The room *** or any part thereof *** with any book, instrument or The statute provides punishment for any person "who keeps any then and there being kept for the purpose of registering data." "with a certain book and instrument known as a book, said book The information charged that defendant kept a certain room follows the language of the statute in every essential respect. with the section of the statute shows that the information virtually instrument or device. Comparing the language of the information offense, in that it fails to allege that defendant kept a book. It is next contended that the information states no the front part of the premises was a barber shop. of Cook and State of Illinois, and the evidence indicates that premises as "122 S. Canal Street," in the City of Chicago, County The instant information specifically described the fair or race track associations under certain circumstances. provision that the act shall not apply to the actual execution of stated in the proviso is no part of the offense and is simply a wife stated in The People v. Turner, 214 Ill. 140. The exception The statute under consideration comes under the People v. Talbot, 332 Ill. 416. Some cases are The People v. Martin, 214 Ill. 110; The ground that the exception was a necessary ingredient of the ment must be included in the indictment, it has been upon the People, 194 Ill. 284. Where it has been held that a negative aver- See also The People v. Montgomery, 211 Ill. 280; Swartz v. The but is a mere matter of balance. Exley v. The People, 212 Ill. 328.

It has been repeatedly held that an information or an indictment is sufficient which charges the offense in the words and language of the statute, when the words so far particularize the offense that by their use alone defendant is notified with reasonable certainty of the offense with which he is charged.

The People v. Scattura, 238 Ill. 313; The People v. St. Clair, 244 Ill. 444.

It is next argued that the evidence fails to show that defendant kept the premises in question; that there was no evidence that he was the keeper of the same or had custody or control thereof, and cases are cited where it has been held that the evidence shows that the accused were no more than by-standers.

Officer Crosoli testified in the present case that he was a police officer in Cook county; that he met a man in front of the premises who led him into the barber shop and into the rear room; that he there saw some sheets on top of the desk before which defendant was seated; that the witness said to defendant that he had \$2 he wished to bet on Number 147, which was a number appearing on the cardboard sheet; that he then changed his mind and said he wanted to bet on "Calome," which was Number 148. Defendant took the \$2 and initialed the bet on a piece of paper; that the witness saw defendant write the initials given by the witness. These sheets and papers were introduced in evidence and also the \$2, which was the money given in making the bets.

Officer Brault testified for the State, corroborating this testimony. He stated that he saw defendant seated at the desk and writing and that he saw the transaction between Officer Crosoli and the defendant; that when Crosoli said he wanted to make a bet defendant said "Two to win" and the defendant took the \$2 from the Officer and was putting it into a pigeonhole when the witness grabbed the sheet and the money. Officer Crosoli also testified

it has been repeatedly held that an indictment or an indictment is sufficient which charges the offense in the words and language of the statute, when the words so far as the offense that by their use alone defendant is notified with reasonable certainty of the offense with which he is charged. The People v. Gerschlager, 138 Ill. App. 444.

Ill. App. 444.

It is next argued that the evidence fails to show that defendant kept the premises in question; that there was no evidence that he was the keeper of the same or had custody or control thereof, and cases are cited where it has been held that the evidence shows that the accused were no more than by-standers. Officer Gerschlager testified in the present case that he was a police officer in Cook County; that he met a man in front of the premises who led him into the barroom and into the rear room; that he there saw some guests on top of the desk before which defendant was seated; that the witness said to defendant that he had \$2 he wished to bet on number 147, which was a number appearing on the cardboard sheet; that he then changed his mind and said he wanted to bet on "Galea", which was number 146. Defendant took the \$2 and initiated the bet on a piece of paper; that the witness saw defendant write the initials given by the witness. These answers and papers were introduced in evidence and also the \$2, which was the money given in making the bet.

Officer Gerschlager testified that the same, after receiving this testimony, he stated that he saw defendant seated at the desk and writing and that he saw the transaction between Officer Gerschlager and the defendant; that when Gerschlager said he wanted to make a bet defendant said "Two to win", and the defendant took the \$2 from the Officer and was passing it into a sideboard when the witness grabbed the sheet and the money. Officer Gerschlager also testified

that he knew "Calome" was the name of a three year old horse which he had seen.

The so-called racing sheet in evidence is a cardboard sheet and contains a list of races and the names of the horses in Saratoga, Hawthorne and Dade Park and a large number of written notations. To describe all these in detail would consume much space and is unnecessary. It is sufficient to say that they show without question that it was a book or device kept in which were recorded bets made on horses participating in racing. Under less convincing evidence convictions have been upheld in many cases. Stevens v. The People, 67 Ill. 587; Robbins v. The People, 95 Ill. 175; Ward v. The People, 23 Ill. App. 510; The People v. Bell, 212 Ill. App. 144.

It is argued by defendant that to sustain a conviction there must be evidence of an actual horse race. We do not think it is necessary to prove that a race, in fact, took place. The statute defines the crime as keeping a book or device for the purpose of "recording or registering bets *** upon the result of any trial or contest of skill, speed or power of endurance of man or beast." The sheets in evidence not only contain the dates of the races but notations as to the weather, description and distances of the different races and classification of the horses as to ages ^{their} and names. The only reasonable inference that could be drawn from them is that they relate to the results of horse races run on the dates shown on the sheets. It is the recording of bets upon the results of such races which the statute defines as a crime. It is unnecessary to prove that the actual race took place.

In Robbins v. The People, 95 Ill. 175, which was a gambling case, it was argued that the evidence did not show any gambling "for money or other valuable thing," which words were in the statute defining the crime of gambling. The court held it was

that he knew "Colene" was the name of a three year old horse which he had seen.

The so-called racing sheet in evidence is a card-board

sheet and contains a list of races and the names of the horses in

Sanford, Hawthorne and Dade Park and a large number of written

notations. To describe all these in detail would require much

space and is unnecessary. It is sufficient to say that they show

without question that it was a book or device kept in which were

recorded bets made on horses participating in racing. Under these

convincing evidence convictions have been upheld in many cases.

Stevens v. The People, 67 Ill. 287; Hobbs v. The People, 88 Ill.

178; Ward v. The People, 82 Ill. 400; The People v. Bell, 212

Ill. App. 144.

It is argued by defendant that to sustain a conviction

there must be evidence of an actual horse race. We do not think

it is necessary to prove that a race, in fact, took place. The

statute defines the crime as keeping a book or device for the pur-

pose of "recording or registering bets *** upon the result of

any trial or contest of skill, speed or power of endurance of man

or beast." The sheets in evidence not only contain the dates of

the races but notations as to the weather, description and distance

of the different races and classification of the horses as to ages

and names. The only reasonable inference that could be drawn from

them is that they relate to the results of horse races run on the

dates shown on the sheets. It is the recording of bets upon the

results of such races which the statute defines as a crime. It is

unnecessary to prove that the actual race took place.

In Hobbs v. The People, 88 Ill. 178, which was a

gambling case, it was argued that the evidence did not show any

gambling "for money or other valuable thing," which words were in

the statute defining the crime of gambling. The court held it was

not necessary for the witnesses to state that the gambling was for money or other valuable thing; that evidence of a fact may be derived from inference and that the court should bring to bear upon such testimony its common observation and general knowledge and draw the inference from it which it properly may do.

We hold that the evidence justified the finding of the court and the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

not necessary for the witnesses to state that the gambling was for money or other valuable thing; that evidence of a fact may be derived from inference and that the court should bring to bear upon such testimony the common observation and general knowledge and draw the inference from it which it properly may do. We hold that the evidence established the finding of the court and the judgment is affirmed.

ATTESTED.

WALTER H. T. J. and O'Connor, J., concur.

34963

108
LOUIS SCULLY,
Appellee.

vs.

ALBERT J. SCHORSCH, LOUIS L. SCHORSCH
and ANTHONY F. SCHORSCH, Doing Business
as ALBERT J. SCHORSCH & COMPANY,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

260 I.A. 631²

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an adverse judgment in the sum of \$3488.54 entered upon the findings of the court upon the trial of a suit for payment for laying sewers and drains in a subdivision owned by defendants.

There is no dispute as to the work done or the prices. Defendants admit owing a part of plaintiff's claim, but deny liability for the balance, asserting that they had an agreement with plaintiff that he would look to the Board of Education of the City of Chicago for this.

The contract was entered into June 23, 1927, in the form of a letter from defendants to plaintiff accepting plaintiff's terms for laying sewers, manholes, catch basins, etc., in defendants' subdivision at the northeast corner of Belmont and Oak Park avenues in Chicago. The City of Chicago had commenced condemnation proceedings in 1925, seeking to take a block for school purposes in this subdivision, and defendants assert that before plaintiff did any work under their contract he agreed that he would not proceed with the work unless he could make satisfactory arrangements with the City to pay its proportionate share of the work done on the sides of the blocks facing said school property, and that plaintiff agreed to carry on with the work at the prices fixed in the original contract but would look to the City for one-half

8

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

LOUIS SCULLY, Appellee.

ALBERT J. SCHORRER, LOUIS H. SCHORRER and ANTHONY J. SCHORRER, Joint Plaintiffs, vs. ALBERT J. SCHORRER & COMPANY, Appellants.

360 I.V. 631

MR. JUSTICE NEASELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an adverse judgment in the sum of \$3488.84 entered upon the findings of the court upon the trial of a suit for payment for laying sewers and drains in a subdivision owned by defendants.

There is no dispute as to the work done at the place. Defendants admit owing a part of plaintiff's claim, but deny liability for the balance, asserting that they had an agreement with plaintiff that he would look to the Board of Education of the City of Chicago for this.

The contract was entered into June 25, 1927, in the form of a letter from defendants to plaintiff accepting plaintiff's terms for laying sewers, manholes, catch basins, etc., in defendant's subdivision at the northwest corner of Belmont and Oak Park avenues in Chicago. The City of Chicago had commenced condemnation proceedings in 1925, seeking to take a block for school purposes in this subdivision, and defendants assert that before plaintiff did any work under their contract he agreed that he would not proceed with the work unless he could make satisfactory arrangements with the City to pay the proportionate share of the work done on the sides of the block facing said school property, and that plaintiff agreed to carry on with the work at the prices fixed in the original contract but would look to the City for one-half

of the cost of said sewers and drains in said two blocks. Defendants argue that plaintiff then proceeded with the work and assured defendants that he would collect the proportionate share of the cost from the City of Chicago.

After considering the somewhat variant testimony we held that the trial court could properly conclude that defendants' version was not supported by the evidence. The condemnation proceedings were commenced some years before the contract was made between the instant parties. The defendants, as appears from their own testimony, had actual knowledge of the pendency of the condemnation proceedings prior to the execution of the contract. Although defendants testified to the making of the oral agreement claimed by them, William Farrell, who was plaintiff's manager, denied categorically and repeatedly that any such arrangements were made. The court could properly believe that after the work was done plaintiff made repeated demands upon defendants for payment; that then it was that Louis Schorsch, one of the defendants, requested Farrell to assist defendants in their attempt to obtain the consent of the Board of Education to pay for the proportionate share of the improvements in the two blocks.

John E. Byrnes, chief clerk of the Board of Education and a disinterested witness, testified that Schorsch, Farrell and plaintiff called upon him with reference to the matter; that Schorsch ^{never} said that the claim presented to the Board was for the benefit of plaintiff but stated that it was his own claim and "not to Mr. Scully personally;" that Scully told the witness, in substance, that he was expecting to get his money from defendants; that Louis Schorsch made the request that the Board of Education should pay its proportionate share of the expense and was told by the witness that there had been no authority to pay such expenses; that Schorsch protested that this would mean a loss to him and the

of the cost of said sewers and drains in said two blocks. Defendant
ants argue that plaintiff then proceeded with the work and assumed
defendants that he would collect the proportionate share of the
cost from the City of Chicago.
After considering the somewhat variant testimony we
hold that the trial court could properly conclude that defendants'
version was not supported by the evidence. The condemnation pro-
ceedings were commenced some years before the contract was made
between the instant parties. The defendant, as appears from
their own testimony, had actual knowledge of the pendency of the
condemnation proceedings prior to the execution of the contract.
Although defendant testified to the making of the oral agreement
claimed by them, William Kervill, who was plaintiff's manager,
denied categorically and repeatedly that any such arrangements
were made. The court could properly believe that after the work
was done plaintiff made repeated demands upon defendant for pay-
ment; that then it was that Louis Schorsch, one of the defendants,
requested Kervill to assist defendant in their attempt to obtain
the consent of the Board of Education to pay for the proportionate
share of the improvements in the two blocks.
John M. Byrne, chief clerk of the Board of Education
and a disinterested witness, testified that Schorsch, Kervill and
plaintiff called upon him with reference to the matter; that
Schorsch said that the claim presented to the Board was for the
benefit of plaintiff but stated that it was his own claim and "not
to him, really personally;" that Gouldy told the witness, in sub-
stance, that he was expecting to get his money from defendant;
that Louis Schorsch made the request that the Board of Education
should pay its proportionate share of the expenses and was told by
the witness that there had been no authority to pay such expenses;
that Schorsch protested that this would mean a loss to him and the

witness told him to figure out how much was claimed as the proportionate share which he thought the Board should pay and the claim would be referred to their attorney; thereupon Farrell, as a favor to Schorsch, made out a statement showing that Albert J. Schorsch & Company was indebted to Louis Scully to the amount of \$8679.75 and at the bottom of the bill split up this amount so as to indicate what Schorsch & Company's share would be and what the Board of Education's share would be.

It should be noted that this statement is of the amount owing from defendants to plaintiff and cannot be construed as a bill of plaintiff to the Board of Education. It is entirely consistent with the testimony of Byrnes and Farrell that the split-up of the amount was placed there at Byrnes' suggestion so that the Board of Education could know the amount claimed by defendants from the Board. It is also in evidence that, although this statement is dated June 25, 1928, it was not, in fact, made until September, 1929, after the interview with Byrnes.

From these and other circumstances in evidence the court could properly conclude that the original contract between the parties was not changed or modified; that there was never any agreement that the plaintiff should look to the Board of Education or the City of Chicago for any part of the payment for the work done and that the defendants were liable to plaintiff for the whole amount of the bill.

Defendants protest against the allowance of interest. Plaintiff claims that there was unreasonable and vexatious delay in making payments. The work was completed in June, 1928, and thereafter both plaintiff and Farrell called on defendants for payments many times. Farrell called at least six or more times and was told by defendants that they would take care of the bill later on. Louis Schorsch told plaintiff that the bill would be paid but that defendants were then a little short. There was

witness told him to figure out how much was claimed as the proportionate share which he thought the Board should pay and the claim would be referred to their attorney; thereupon Farrell, as a favor to Behorach, made out a statement showing that Albert J. Behorach & Company was indebted to Louis Behorach for the amount of \$8875.75 and at the bottom of the bill split up this amount so as to indicate what Behorach & Company's share would be and what the Board of Education's share would be.

It should be noted that this statement is of the amount owing from defendants to plaintiff and cannot be construed as a bill of plaintiff to the Board of Education. It is entirely consistent with the testimony of Hyman and Farrell that the split-up of the amount was placed there at Hyman's suggestion so that the Board of Education would know the amount claimed by defendants from the Board. It is also in evidence that, although this statement is dated June 25, 1935, it was not, in fact, made until September, 1935, after the interview with Hyman.

From these and other circumstances in evidence the court could properly conclude that the original contract between the parties was not changed or modified; that there was never any agreement that the plaintiff should look to the Board of Education or the City of Chicago for any part of the payment for the work done and that the defendants were liable to plaintiff for the whole amount of the bill.

Defendants protest against the allowance of interest. Plaintiff claims that there was unreasonable and vexatious delay in making payments. The work was completed in June, 1935, and thereafter both plaintiff and Farrell called on defendants for payments many times. Farrell called at least six or more times and was told by defendants that they would take care of the bill later on. Louis Behorach told plaintiff that the bill would be paid but that defendants were then a little short. There was

no question raised then about the Board of Education's liability for part of the bill. In January, 1929, defendants paid \$2,000 on account. Louis Schorsch testified that this was enclosed with a letter containing the statement that defendants understand it is possible to get a settlement from the school board and that Louis Schorsch would be glad to meet plaintiff to present the matter to the school board. Plaintiff denied receiving any letter with the check. The letter introduced in evidence purported to be a carbon copy.

No further amount being forthcoming, this suit was commenced March 24, 1930. Defendants' affidavit of merits alleged that the subsequent oral agreement relating to the cost of part of the work to be paid by the Board of Education was made on June 25, 1928, but the evidence shows that on this date the work was completed. Later an amended affidavit of merits was filed, in which defendants say that after the original contract was entered into between the parties the Board of Education, over the protest of defendants, condemned the property in question, whereupon defendants promptly notified plaintiff that, unless the contract could be modified, he should not proceed with the work. This well merits the characterization of a frivolous defense, since the condemnation proceedings were commenced long before the original contract had been entered into and the defendants admittedly had knowledge of this fact. We are inclined to conclude that the trial court could properly believe that the delay was unreasonable and vexatious and the refusal to pay was for the sole purpose of delaying or defeating a just claim. Under such circumstances the plaintiff should be allowed interest. Rector v. Duntley Mfg. Co., 189 Ill. App. 562; Steer v. Oppenheimer, 211 Ill. App. 397.

We see no reason to disagree with the finding of the court and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

no question raised then about the Board of Education's liability
for part of the bill. In January, 1939, defendant paid \$2,000
on account. Louis Hornebach testified that this was entered with
a letter containing the agreement that defendant understood it is
possible to get a settlement from the school board and that Louis
Hornebach would be glad to meet plaintiff to present the matter to
the school board. Plaintiff denied receiving any letter with the
check. The letter introduced in evidence purported to be a carbon
copy.

No further amount being forthcoming, this suit was
commenced March 24, 1939. Defendant's affidavit of merits alleged
that the subsequent oral agreement relating to the cost of part of
the work to be paid by the Board of Education was made on June 22,
1939, but the evidence shows that on this date the work was com-
pleted. Later an amended affidavit of merits was filed, in which
defendant says that after the original contract was entered into
between the parties the Board of Education, over the protest of
defendant, abandoned the property in question, whereas defen-
dant promptly notified plaintiff that, unless the contract could
be modified, he should not proceed with the work. This well settled
the character of a rescission of the contract, since the consideration
proceedings were commenced long before the original contract had
been entered into and the defendant admittedly had knowledge of
this fact. We are inclined to conclude that the trial court could
properly believe that the delay was unreasonable and vexatious and
the refusal to pay was for the sole purpose of delaying or defeating
a just claim. Under such circumstances the plaintiff should be
allowed interest. Street v. Garwood, 111 Ill. App. 357.
Street v. Garwood, 111 Ill. App. 357.
We see no reason to disagree with the finding of the court
and the judgment is therefore affirmed.

Noted: P. J., and G. J., concur.

34865

W. C. HANLEY,
Defendant in Error.

vs.

ELIZABETH SIEGL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

260 I.A. 631³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment of \$1600 rendered against her in favor of the plaintiff. The judgment was entered on a promissory note for \$1500 made by the defendant on November 17, 1927, payable to the order of Jack White and due ninety days after date. There was a written guarantee on the back of the note signed by the defendant, the payee, Jack White, and by George Wilhelm. Five days after the date of the note plaintiff, who claimed to be the endorsee of the note, caused judgment to be entered by confession against the maker, Elizabeth Siegl. The judgment was afterwards opened up and a trial had before the court without a jury, and a finding in favor of the plaintiff. A new trial was awarded and another trial had before another judge, and there was again a finding in favor of plaintiff, judgment was entered on the finding, and this appeal followed.

It appears from the evidence that plaintiff was engaged in the business of buying commercial paper and that the defendant wanted to borrow \$1500 to pay some bills she had incurred in connection with the repairs of her house, and with this in mind she spoke to her son-in-law, George Wilhelm, whose name appears as a guarantor on the back of the note, and he took the matter up with Jack White, the payee and a guarantor of the note, it was brought to plaintiff's attention, and on November 17, 1927, plaintiff's manager, Carl W. Puls, went to see the defendant at her home.

W. C. HANLEY,
 Defendant in Error.
 vs.
 ELIZABETH SINGH,
 Plaintiff in Error.

MEMORANDUM FOR THE HONORABLE
 JUSTICE OF THE PEACE
 OF CHICAGO

2001.A.831

MR. JUSTICE CONNER DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment of \$1500 rendered against her in favor of the plaintiff. The judgment was entered on a promissory note for \$1500 made by the defendant on November 17, 1927, payable to the order of Jack White and due ninety days after date. There was a written guarantee on the back of the note signed by the defendant, the payee, Jack White, and by George Wilhelm. Five days after the date of the note plaintiff, who claimed to be the endorser of the note, caused judgment to be entered by conclusion against the maker, Elizabeth Singh. The judgment was afterwards opened up and a trial had before the court without a jury, and a finding in favor of the plaintiff. A new trial was awarded and another trial had before another judge, and there was again a finding in favor of plaintiff. Judgment was entered on the finding, and this appeal followed. It appears from the evidence that plaintiff was engaged in the business of buying commercial paper, and that the defendant wanted to borrow \$1500 to pay some bills she had incurred in connection with the repairs of her house, and with this in mind she spoke to her son-in-law, George Wilhelm, whose name appears as a guarantor on the back of the note, and he took the matter up with Jack White, the payee and a guarantor of the note, it was brought to plaintiff's attention, and on November 17, 1927, plaintiff's manager, Carl W. Lutz, went to see the defendant at her home.

There were present at that time the defendant, her daughter, Mrs. Wilhelm and her husband George Wilhelm, Jack White and Puls. At that time the note in question was presented to the defendant for her signature, as well as a letter dated the same day addressed to Jack White, the payee, and endorsee of the note, in which it was stated, "For the purpose of inducing you to accept my note for the sum of \$1,500.00 due in ninety days from the date hereof in payment for certain securities for which I hereby acknowledge receipt, I make the following statement which I represent to be true." In the next paragraph defendant states that she is the owner of property known as 4319 North Mozart street, Chicago, and that it is mortgaged for \$9,500; that there are no taxes or assessments against it and that she also owned other real estate in Chicago. The letter and note were signed by the defendant and the evidence is to the effect that they were taken by Puls and the defendant testified that Puls stated at the time that he would have to deliver the note and letter to the plaintiff before plaintiff would pay the defendant \$1300, which was to be the consideration of the note for \$1500; that plaintiff was charging \$200 for making the loan. Defendant further testified that Puls stated he would return with the check for \$1300 within an hour or two; that he never returned, never gave her any money or other thing of value for the note, and that she never received any securities from White or anyone else for the note; that she received nothing for the note. She further testified that she never knew White until just prior to the time she signed the note and letter and that she had not seen him since. There is further evidence in the record that indicates that White had some connection with the plaintiff. This is shown by the fact that he had signed affidavits of plaintiff's claims in suits brought by the plaintiff against other parties in the Municipal court.

There were present at that time the defendant, her daughter, Mrs. Wilhelm and her husband George Wilhelm, Jack White and Paul. At that time the note in question was presented to the defendant for her signature, as well as a letter dated the same day addressed to Jack White, the payee, and endorsee of the note, in which it was stated, "For the purpose of inducing you to accept my note for the sum of \$1,500.00 due in ninety days from the date hereof in payment for certain securities for which I hereby acknowledge receipt, I make the following statement which I represent to be true." In the next paragraph defendant states that she is the owner of property known as 4219 North Howard street, Chicago, and that it is mortgaged for \$6,500; that there are no taxes or assessments against it and that she also owned other real estate in Chicago. The letter and note were signed by the defendant and the evidence is to the effect that they were taken by Paul and the defendant testified that this stated at the time that he would have to deliver the note and letter to the plaintiff before plaintiff would pay the defendant \$1500, which was to be the consideration of the note for \$1500; that plaintiff was charging \$200 for making the loan. Defendant further testified that this stated he would return with the check for \$1500 within an hour or two; that he never returned, never gave her any money or other thing of value for the note, and that she never received any securities from White or anyone else for the note; that she received nothing for the note. She further testified that she never knew White until just prior to the time she signed the note and letter and that she had not seen him since. There is further evidence in the record that indicates that White had some connection with the plaintiff. This is shown by the fact that he had signed affidavits of plaintiff's claims in suits brought by the plaintiff against other parties in the Municipal court.

Plaintiff and Puls, his manager, testified but neither of them gave any testimony as to what plaintiff gave for the note. A great deal of argument is in the record between court and counsel as to whether Puls, at the time the note was executed, was the agent of the plaintiff. The evidence is clear that he was. The evidence tends to show that plaintiff was not a bona fide holder in due course, and therefore evidence as to what was said and done at the time of the execution of the note is admissible.

On the defendant's side there was also a failure to develop all the facts. The defendant testified that she needed the \$1300 with which to pay some bills, and on cross-examination she testified that when the money was not forthcoming she did not demand the \$1300 from plaintiff. But apparently the facts in this respect were not all adduced, but it appears that five days after the making of the note judgment was entered by confession. In view of the unsatisfactory state of the record we think there should be a retrial of this case, when all of the facts should be developed.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

Plaintiff and wife, his manager, testified but neither of them gave any testimony as to what plaintiff gave for the note. A great deal of argument is in the record between court and counsel as to whether wife, at the time the note was executed, was the agent of the plaintiff. The evidence is clear that he was.

The evidence tends to show that plaintiff was not a bona fide holder in due course, and therefore evidence as to what was said and done at the time of the execution of the note is admissible. On the defendant's side there was also a failure to

develop all the facts. The defendant testified that she needed the \$1200 with which to pay some bills, and on cross-examination she testified that when the money was not forthcoming she did not demand the \$1200 from plaintiff. But apparently the facts in this respect were not all introduced, but it appears that five days after the making of the note judgment was entered by confession. In view of the unnecessary waste of the record we think there should be a revival of this case, when all of the facts should be

developed. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial. RETURNED AND REMANDED.

Ketchum, P. J., and McHenry, J., concur.

34880

110
VALERIA GLOWACKI and DR. MICHAEL
LEWINSKI,

Appellees,

vs.

UNION BANK OF CHICAGO, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 631⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against the defendant to recover \$3250 which they claimed to have paid the defendant on account of the purchase of three lots. The basis of their claim is that defendant was unable to give good title to the lots and therefore they were entitled to the return of their money. There was a trial before the court without a jury and a finding and judgment in plaintiffs' favor for the amount of their claim, and the defendant appeals.

The record discloses that on May 29, 1925, plaintiffs and defendant entered into a written contract whereby the defendant agreed to sell and the plaintiffs to buy three lots located in Cook county, Illinois, for \$5,000, \$1250 cash and the balance in stated installments, the last payment being due and payable on May 29, 1928, at which time the defendant was to convey the lots in fee simple by warranty deed.

The evidence further shows that plaintiffs made all payments required by the contract until February, 1928, at which time plaintiffs, having obtained an opinion of title from the Chicago Title and Trust Company, called on the defendant in reference to the title to the lots. From the opinion it appeared that on July 22, 1925, George T. Preschern, a trust officer of defendant, conveyed the lots in question by warranty deed to Konstanty Buckun and wife as joint tenants. The opinion also showed that the de-

VALERIA GLOWACKI and DR. MICHAEL LEWISKI,

Appellants,

vs.

UNION BANK OF CHICAGO, a corporation.
Appellee.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2001.A.631

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against the defendant to recover \$3280 which they claimed to have paid the defendant on account of the purchase of three lots. The basis of their claim is that defendant was unable to give good title to the lots and therefore they were entitled to the return of their money. There was a trial before the court without a jury and a finding and judgment in plaintiffs' favor for the amount of their claim, and the defendant appeals.

The record discloses that on May 20, 1928, plaintiffs and defendant entered into a written contract whereby the defendant agreed to sell and the plaintiffs to buy three lots located in Cook county, Illinois, for \$6,000, \$1250 each and the balance in stated installments, the first payment being due and payable on May 20, 1928, at which time the defendant was to convey the lots in fee simple by warranty deed.

The evidence further shows that plaintiffs made all payments required by the contract until February, 1928, at which time plaintiffs, having obtained an opinion of title from the Chicago Title and Trust Company, called on the defendant in reference to the title to the lots. From the opinion it appeared that on July 22, 1925, George T. Froehner, a trust officer of defendant, conveyed the lots in question by warranty deed to Kenneth H. Brown and wife as joint tenants. The opinion also showed that the de-

defendant bank had on January 14, 1927, filed a bill in the Superior court of Cook county to correct the deed from Preschern to Buckun so as to remove it as a cloud on the lots in question. At that time plaintiffs spoke to a representative of the defendant with a view to having the cloud removed from the title so that the lots could be conveyed in accordance with the contract in May, 1928.

The evidence is further to the effect that the defendant was endeavoring to have the cloud removed from the title to the lots so that it could convey them to plaintiffs, but that it was unable to do so until some time in January, 1929, when, it appears, the defendant made a settlement with Buckun. The evidence further is that plaintiffs' counsel called on the bank's representatives a number of times after February, 1928, and demanded the return of plaintiffs' money.

The defendant's position is that when plaintiffs called at the bank in February, 1928, in reference to the title, it was agreed that plaintiffs would not be required to make the further payments as they came due until the title was cleared and that the defendant proceeded to clear the title and thereby plaintiffs waived their right to demand a return of the money. There is some slight conflict in the evidence as to whether plaintiffs demanded a return of the money and repudiated the contract before January, 1929, when plaintiffs' counsel wrote defendant a letter. But plaintiffs' then counsel testified on the trial that he had made a number of specific demands for the return of the money, giving in detail the persons to whom he talked concerning the matter. None of these persons testified, so there is no contradiction of counsel's testimony. In view of this fact it is obvious that we would not be warranted in holding that the finding of the trial Judge in favor of plaintiffs is against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

Defendant bank had on January 14, 1937, filed a bill in the Superior Court of Cook County to correct the deed from Treachman to Hecum as to remove it as a cloud on the title in question. At that time plaintiff's spouse to a representative of the defendant with a view to having the cloud removed from the title as that the title could be conveyed in accordance with the contract in May, 1938. The evidence is further to the effect that the defendant was endeavoring to have the cloud removed from the title to the title so that it could convey them to plaintiff, but that it was unable to do so until some time in January, 1939, when, it appears, the defendant made a settlement with Hecum. The evidence further is that plaintiff's counsel called on the bank's representative a number of times after February, 1938, and demanded the return of plaintiff's money.

The defendant's position is that when plaintiff called at the bank in February, 1939, in reference to the title, it was agreed that plaintiff's money would not be required to make the further payments as they came due until the title was cleared and that the defendant proceeded to clear the title and thereby plaintiff waived their right to demand a return of the money. There is some slight conflict in the evidence as to whether plaintiff demanded a return of the money and repudiated the contract before January, 1939, when plaintiff's counsel wrote defendant a letter, but plaintiff then counsel testified on the trial that he had made a number of specific demands for the return of the money, giving in detail the persons to whom he talked concerning the matter. None of these persons testified, so there is no contradiction of counsel's testimony. In view of this fact it is obvious that we would not be warranted in holding that the timing of the trial judge in favor of plaintiff is against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is

affirmed.

WILLIAMS.

Wheat, P.J., and Mahoney, J., concur.

34927

WATERLOO REGISTER COMPANY,
Appellee,

vs.

WONDER HEATING & VENTILATING
SYSTEMS, Inc.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

260 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$393.31 claimed to be due and owing for goods, wares and merchandise sold and delivered by plaintiff to defendant. Defendant filed an affidavit of merits denying liability and set up that defendant ordered the merchandise from plaintiff but that the merchandise plaintiff delivered was not of the kind ordered; that defendant upon discovering this fact immediately offered to return the merchandise but plaintiff refused to accept it; that the merchandise was ordered on consignment and was to be paid for only in the event it was sold by defendant.

May 23, 1930, the cause came on for hearing on the regular trial call before the court without a jury, and the record then states that "the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit: THE COURT FINDS THE ISSUES AGAINST THE PLAINTIFF." And it was considered and adjudged that plaintiff take nothing by its suit and that the defendant recover its costs from the plaintiff and have execution therefor. On November 22, 1930, the record discloses, plaintiff moved the court to vacate the judgment of May 23rd; that the motion was sustained and the defendant prosecutes this appeal.

In support of its motion to vacate the judgment plaintiff filed a verified petition in which it set up "That at

APPEAL FROM MUNICIPAL COURT

OF CHICAGO

WATERLOO REGISTER COMPANY,
Appellee,

vs.

WOMAN HEATING & VENTILATING
SYSTEMS, INC.,
Appellant.

300 111 032

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$393.31 claimed to be due and owing for goods, wares and merchandise sold and delivered by plaintiff to defendant. Defendant filed an affidavit of merits denying liability and set up that defendant ordered the merchandise from plaintiff but that the merchandise plaintiff delivered was not of the kind ordered; that defendant upon discovering this fact immediately offered to return the merchandise but plaintiff refused to accept it; that the merchandise was ordered on consignment and was to be paid for only in the event it was sold by defendant.

May 23, 1930, the cause came on for hearing on the regular trial call before the court without a jury, and the record then states that "the court having heard the evidence and the arguments of counsel, and being fully advised in the premises, entered the following finding, to-wit: THE COURT FINDS THE DEFENDANT ORDERED THE MERCHANDISE." And it was considered and adjudged that plaintiff take nothing by its suit and that the defendant recover its costs from the plaintiff and have execution therefor. On November 23, 1930, the record discloses, plaintiff moved the court to vacate the judgment of May 23rd; that the motion was sustained and the defendant prosecuted this appeal.

In support of its motion to vacate the judgment plaintiff filed a verified petition in which it set up "That at

the time and prior to the entry of the aforesaid judgment, and as an inducement therefor the defendant represented unto the court that it would return all merchandise not used by it covered by the aforesaid cause and out of which said cause arose, and would pay to the plaintiff the purchase price thereof for all said merchandise used by it."

And the plaintiff further says that notwithstanding the aforesaid representations to the court, and although the judgment was entered for the said defendant upon such understanding, the said defendant has not returned any of the aforesaid merchandise or paid any money therefor." This is all that is set up in the petition to vacate the judgment and it is obviously insufficient. It contradicts the record, which is not allowable, there being no charge of fraud or mistake or lack of knowledge on the part of the trial court when the judgment was rendered.

The record above referred to, which must be taken as absolute verity, shows that the cause came on for hearing in regular order and that the court heard the evidence and decided the issues on the merits against plaintiff. Judgment was entered on the finding and an execution awarded defendant for its costs. This cannot be contradicted by the averments of the petition, by which it is sought to show that the case was not heard by the court at all, but that there was an agreement between the parties for the return of such goods as the defendant did not use and a further agreement to pay for such of the goods as defendant used. The record cannot be contradicted in this way, and the court erred in vacating and setting aside the judgment.

The order of the Municipal court of Chicago appealed from is reversed and the matter remanded with directions to vacate the order of November 22, 1930, and to reinstate the judgment in favor of the defendant entered May 23, 1930.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

the time and prior to the entry of the aforesaid judgment, and an
 an indictment therefor the defendant represented into the court
 that it would return all merchandise not used by it covered by the
 aforesaid cause and out of which said cause arose, and would pay
 to the plaintiff the purchase price thereof for all said merchandise
 used by it."

And the plaintiff further says that notwithstanding
 the aforesaid representations to the court, and although the judg-
 ment was entered for the said defendant upon such understanding,
 the said defendant has not returned any of the aforesaid merchandise
 or paid any money therefor. "This is all that is set up in the de-
 fense to vacate the judgment and it is obviously insufficient. It
 contradicts the record, which is not dispositive, there being no
 charge of fraud or mistake or lack of knowledge on the part of the
 trial court when the judgment was rendered."

The record above referred to, which need be taken as
 absolute verity, shows that the cause came on for hearing in regu-
 lar order and that the court heard the evidence and decided the
 issues on the merits against defendant. Judgment was entered on
 the finding and an execution awarded defendant for its cause. This
 cannot be contradicted by the averments of the petition, by which
 it is sought to show that the same was not heard by the court at
 all, but that there was an agreement between the parties for the
 return of such goods as the defendant did not use and a further
 agreement to pay for each of the goods as defendant used. The
 record cannot be contradicted in this way, and the court acted in
 vacating and setting aside the judgment.

The order of the Municipal Court of Chicago whereby
 from is reversed and the matter remanded with directions to vacate
 the order of November 28, 1930, and to rehear the defendant in
 favor of the defendant entered May 23, 1931.

REVEREND AND HONORABLE JUDGE

Ketchum, J., and Justice, J., concur.

34943

JOHN C. CARPENTER and CHICAGO
TITLE AND TRUST COMPANY as Trustees,

vs.

ELEANOR C. HALL et al.

NORTH TOWN STATE BANK, Receiver,
Appellee,

vs.

L. ALBERT STEWART,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 632²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal L. Albert Stewart seeks to reverse an order of the Superior court of Cook county whereby it was decreed that he pay \$125 a month as rent for the premises which he was occupying and which were being foreclosed, to the receiver.

The record discloses that May 26, 1930, complainants filed their bill to foreclose an incumbrance on the property. The notes and trust deed were executed by the defendant Eleanor C. Hall, and she was made the sole defendant. July 16th she filed her answer in which she admits the making of the notes and trust deed and sets up that the purchase was made by her for L. Albert Stewart, her son-in-law, and his wife, who immediately went into possession of the premises at the time they were conveyed to Mrs. Hall. The bill was verified and July 29, 1930, on motion of solicitors for the complainants, a receiver was appointed, notice having theretofore been given to the then sole defendant, Eleanor C. Hall, the order stating that she was the sole defendant and owner of the equity of redemption and in possession of the premises being foreclosed. The order finds default in the payment of principal, interest and taxes, and that the rents, issues and profits were pledged by the mortgage as additional security; that the property is scant and meager security for the

JOHN G. CARPENTER and CHICAGO
TITLE AND TRUST COMPANY as Trustees,

vs.

ELIZABETH C. HALL et al.

NORTH TOWN STATE BANK, Receiver,
Appellee,

vs.

I. ALBERT STEWART,
Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

2201 A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal I. Albert Stewart seeks to reverse an order of the Superior Court of Cook County whereby it was decreed that he pay \$155 a month as rent for the premises which he was occupying and which were being foreclosed, to the receiver.

The record discloses that May 28, 1930, complainant filed their bill to foreclose an incumbrance on the property. The notes and trust deed were executed by the defendant Elizabeth C. Hall, and she made the sole defendant. July 18th she filed her answer in which she admits the making of the notes and trust deed and sets up that the purchase was made by her for I. Albert Stewart, her son-in-law, and his wife, and immediately went into possession of the premises at the time they were conveyed to Mrs. Hall. The bill was verified and July 29, 1930, on motion of solicitors for the complainants, a receiver was appointed, notice having theretofore been given to the then sole defendant, Elizabeth C. Hall, the order reciting that she was the sole defendant and owner of the equity of redemption and in possession of the premises being foreclosed. The order finds default in the payment of principal, interest and taxes, and that the rents, issues and profits were pledged by the mortgagor as additional security; that the property is tenant and meager security for the

payment of the indebtedness secured by the trust deed, and the North Town State Bank was appointed receiver with the usual power.

Afterwards, on October 7, 1930, an order was entered on motion of the complainants, giving them leave to amend the bill by making L. Albert Stewart and his wife defendants, and for summons. October 15, 1930, the receiver filed its verified petition in which it set up inter alia that the premises being foreclosed were improved with a twelve room frame house of three stories and basement and also by a three car garage; that the reasonable rental value was \$250 a month; that Mrs. Hall, the maker of the note and trust deed being foreclosed, was, on the date of the appointment of the receiver and has continuously since that date resided in the premises and is in possession of them; that the receiver had demanded rent from her but she refused to pay, stating that the matter was under the direction of her solicitor; the prayer was that she be required to answer the petition and to show cause why she should not be required to pay a reasonable amount to the receiver as rent for the premises. October 20th she filed her answer to the petition in which she set up the appointment of the receiver on July 29th, the subsequent amendment of the bill making additional parties defendant as above mentioned, "and that there was no clause continuing said receivership, and that, therefore, the said receiver is not now acting as receiver;" that she has never been in possession of the premises; that on September 25th, 1928, she, acting for her daughter and L. A. Stewart, her daughter's husband, purchased the premises in question from the complainant, Carpenter, and that he knew the purchase was made for Stewart and his wife and that possession of the premises had been immediately turned over to Stewart and his wife.

November 29th the order appealed from was entered, which recites that upon the motion of the receiver L. A. Stewart be

payment of the indebtedness secured by the first deed, and the North Town State Bank was appointed receiver with the usual power. Afterwards, on October 7, 1930, an order was entered on motion of the complainants, giving them leave to amend the bill by making J. Albert Stewart and his wife defendants, and for reasons October 18, 1930, the receiver filed the verified petition in which it set up inter alia that the premises being foreclosed were improved with a twelve room frame house of three stories and basement and also by a three car garage; that the reasonable rental value was \$280 a month; that Mrs. Hall, the widow of the mortgagor and first deed being foreclosed, was, on the date of the appointment of the receiver and has continuously since that date resided in the premises and is in possession of them; that the receiver had demanded rent from her but she refused to pay, stating that the mortgagor was under the direction of her solicitor; the order was that she be required to answer the petition and to show cause why she should not be required to pay a reasonable amount to the receiver as rent for the premises. October 23rd the bill was amended so that the petition in which was set up the appointment of the receiver on July 23rd, the subsequent amendment of the bill making additional parties defendant as above mentioned, and that there was no clause concerning said receiver, and that, therefore, the said receiver is not now acting as receiver; that she has never been in possession of the premises; that on September 23rd, 1930, she, acting for her daughter and J. A. Stewart, her daughter's husband, purchased the premises in question from the complainants, Garretts, and that she knew the purchase was made for Stewart and his wife and that possession of the premises had been immediately turned over to Stewart and his wife.

November 23rd the order requested from was entered, which recited that upon the motion of the receiver J. A. Stewart be

required to pay rent for the premises in question, and the court having heard the evidence, and Stewart being present in open court, found the reasonable rental value of the premises \$125.00 a month, and it was ordered that Stewart pay this monthly, beginning the 1st of December.

The certificate of evidence shows that when the motion of the receiver to require Stewart to pay rent came on for hearing, Stewart appeared by himself and his counsel, and was sworn and testified. His testimony is to the effect that his wife, two children and himself occupied the premises and that his mother-in-law, the defendant, Mrs. Hall, at times also lives in the property. The testimony of Stewart also is to the effect that the reasonable rental value of the premises is more than the amount he was ordered to pay by the court. Stewart was the only witness that was heard on the motion of the receiver, and it is obvious that there is no reason why he should not be required to pay the rent. There was default in payment of principal, interest and taxes, and the court found that the premises were scant security for the incumbrances.

Stewart, in support of his appeal, contends that when the court permitted the complainants to amend their bill as above stated, this automatically removed the receiver and the receiver's power was thereby terminated. We think there is no merit in this contention and that the case of Odell v. Levy, 307 Ill. 277, which counsel for Stewart relies upon, is not in point. It was held in that case that where a decree pro confesso had been entered and there was a subsequent amendment to the bill authorizing the defendant to answer both the original and amended bills, the effect of the order was to vacate the decree. There was no decree in this case, but a simple order appointing the receiver, and it is not every order that is entered in a case that is vacated by the amendment of the bill. In the instant case, so far as the record dis-

required to pay rent for the premises in question, and the court having heard the evidence, and Stewart being present in open court, found the reasonable rental value of the premises \$125.00 a month, and it was ordered that Stewart pay this monthly, beginning the 1st of December.

The certificate of evidence shows that when the motion of the receiver to require Stewart to pay rent came on for hearing, Stewart appeared by himself and his counsel, and was sworn and testified. His testimony is to the effect that his wife, two children and himself occupied the premises and that his mother-in-law, the defendant, Mrs. Hall, at times also lives in the property. The testimony of Stewart also is to the effect that the reasonable

rental value of the premises is more than the amount he was ordered to pay by the court. Stewart was the only witness that was heard on the motion of the receiver, and it is obvious that there is no reason why he should not be required to pay the rent. There was default in payment of principal, interest and taxes, and the court found that the premises were rented recently for the same amount.

Stewart, in support of his appeal, contends that when the court permitted the complainants to amend their bill as above stated, this automatically removed the receiver and the receiver's power was thereby terminated. He claims there is no merit in this contention and that the case of Quill v. Day, 307 Ill. 527, which counsel for Stewart relies upon, is not in point. It was held in

that case that where a decree had been entered and there was a subsequent amendment to the bill notwithstanding the defendant to answer both the original and amended bills, the effect

of the order was to vacate the decree. There was no decree in this case, but a simple order appointing the receiver, and it is not every order that is entered in a case that is vacated by the amendment of the bill. In the instant case, so far as the record dis-

closes, the only amendment to the bill was that Stewart and his wife were made additional parties defendant.

A further point is made that the defendant is entitled to his day in court. Obviously this is the law, but the defendant, Stewart, did have his day in court; in fact he was the only witness who testified on the hearing. And the further point made is that since the petition filed by the receiver alleged that Mrs. Hall was in possession and that she be required to pay rent, the order requiring Stewart to pay rent was not warranted because the petition had not been amended. We think this contention is equally without substance. While it would have been the proper practice to have amended the petition, yet we think the order might properly have been entered without any petition at all, merely upon motion. Certain it is that any irregularity, which in no way prejudicially affects Stewart, ought not cause a reversal of the order. There is no merit in any of Stewart's contentions, and the order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

...the only amendment to the bill was that Stewart and his wife were made additional parties defendant. A further point is made that the defendant is entitled to his day in court. Obviously this is the law, but the defendant, Stewart, did have his day in court; in fact he was the only witness who testified on the hearing. And the further point made is that since the petition filed by the receiver alleged that Mrs. Hall was in possession and that she be required to pay rent, the order requiring Stewart to pay rent was not warranted because the petition had not been amended. We think this contention is equally without substance. While it would have been the proper practice to have amended the petition, yet we think the order might properly have been entered without any petition at all, merely upon motion. Certain it is that any irregularity, which in no way prejudicially affects Stewart, cannot now cause a reversal of the order. There is no merit in any of Stewart's contentions, and the order appealed from is affirmed.

AFFIRMED.

McDonnell, F. J., and McQuinn, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ^{third} ~~seventh~~ day of ^{February} ~~October~~, in
the year of our Lord one thousand nine hundred and thirty-one
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. Welter
~~FLOYD S. CLARK~~, Sheriff.

260 I.A. 632³

BE IT REMEMBERED, that afterwards, to-wit: On
Feb. 4, 1931, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

DECEMBER 1, 1900

TO THE PRESIDENT OF THE UNIVERSITY

AND THE FACULTY

OF THE UNIVERSITY OF CHICAGO

1900

BE IT REMEMBERED

THAT THIS

BOOK OF

THE UNIVERSITY OF CHICAGO

JAMES MCPHERSON,

Appellee,

-vs-

ROCKFORD PUBLIC SERVICE COMPANY, a Corporation; HUGHES PUTNEY COMPANY, a Corporation, and JOHN R. FAIRLEY,

Appeal from
Circuit Court
Winnebago County.

Appellants,

Boggs, J.

An action on the case was instituted by appellee against appellants and one John R. Fairley in the Circuit Court of Winnebago County to recover for injuries claimed to have been suffered in a collision between a street car of appellant Rockford Public Service Company and a truck driven by Fairley while hauling gravel and cement for appellant Hughes Putney Company.

The declaration contains two counts. The first count charges that on September 27, 1928, "the defendants Hughes Putney Company and John R. Fairley were operating a gravel truck along Whitman Street and the defendant Rockford Public Service Company was operating a street car along north Church street," that appellee was riding as a passenger on said street car, and that while appellee was in the exercise of due care for his own safety, "the defendant Rockford Public Service Company by its then servants, and defendants Hughes Putney Company and John R. Fairley, so managed, operated and controlled the said street car and said truck that by and because of the negligence, carelessness and improper conduct" of said companies and of the said Fairley "the said street car and the said truck collided" and appellee was thrown with great force, etc.

The second count charges that the Rockford Public Service Company operated its said street car at a speed which was "greater than reasonable and proper, and at a speed in excess of fifteen

JAMES W. HARRISON

Appellee,

-vs-

Appeal from
District Court
Winnebago County.

ROCKFORD PUBLIC SERVICE COMPANY,
a corporation; HUGHES PATNEY
PUTNEY COMPANY, a corporation,
and JOHN R. FAIRLEY,

Appellants,

Boggs, J.

An action on the case was instituted by appellee against appellants and one John R. Fairley in the District Court of Winnebago County to recover for injuries claimed to have been suffered in a collision between a street car of appellant Rockford Public Service Company and a truck driven by Fairley while hauling gravel and cement for appellant Hughes Patney Company.

The declaration contains two counts. The first count charges that on September 27, 1928, "the defendants Hughes Patney Company and John R. Fairley were operating a gravel truck along Whitman Street and the defendant Rockford Public Service Company was operating a street car along North Church Street," that appellee was riding as a passenger on said street car, and that while appellee was in the exercise of due care for his own safety, "the defendant Rockford Public Service Company by its then servants, and defendants Hughes Patney Company and John R. Fairley, negligently operated and controlled the said street car and said truck that by and because of the negligence, carelessness and improper conduct of said companies and of the said Fairley, the said street car and the said truck collided" and appellee was thrown with great force, etc.

The second count charges that the Rockford Public Service Company operated its said street car at a speed which was "greater than reasonable and proper, and at a speed in excess of fifteen

miles per hour, and the defendants Hughes Putney Company and John R. Fairley operated said truck at a greater speed than was reasonable and proper, having regard to the traffic and use of the way," etc.

To said declaration the Rockford Public Service Company filed a plea of the general issue, and appellant Hughes Putney Company and John R. Fairley filed a plea of the general issue. In addition thereto, appellant Hughes Putney Company filed a plea that it did not manage, control or operate said truck.

On the trial, appellee dismissed as to the defendant Fairley. A trial was had, resulting in a verdict and judgment in favor of appellee and against appellants for \$2,500. To reverse said judgment, this appeal is prosecuted.

At the close of appellee's evidence and again at the close of all the evidence, separate motions were made by appellants for a directed verdict in their favor. These motions were severally denied.

In motions of this kind, the court does not weight the evidence, and if it can be said in connection with the motion at the close of a plaintiff's case that, taking the plaintiff's evidence as true, with all reasonable inferences to be drawn therefrom, it fairly tends to prove the plaintiff's case, the court would not be warranted in excluding the evidence and directing a verdict. On a motion made at the close of all of the evidence, if it can be said that, taking the evidence in its most favorable aspect in connection with the plaintiff's case, it fairly tends to prove his case, the court would not be warranted in directing a verdict. We would therefore not be warranted in reversing the judgment on the rulings of the court on said motions.

It is next insisted on the part of appellant Rockford Public Service Company that the judgment should be reversed as to it with a finding of fact. From what we have already said, it would follow that we would not be warranted in reversing the judgment with a finding of fact as to either of appellants.

etc. able and proper, having regard to the traffic and use of the way, R. Fairley operated said truck at a greater speed than was reasonable per hour, and the defendant's Hughes Putney Company and John

To said declaration the Rockford Public Service Company filed a plea of the general issue, and appellant Hughes Putney Company and John R. Fairley filed a plea of the general issue. In addition thereto, appellant Hughes Putney Company filed a plea that it did not manage, control or operate said truck. On the trial, appellee dismissed as to the defendant Fairley. A trial was had, resulting in a verdict and judgment in favor of appellee and against appellants for \$2,500. To reverse said judgment, this appeal is presented.

At the close of appellee's evidence and again at the close of all the evidence, separate motions were made by appellants for a directed verdict in their favor. These motions were severally denied.

In motions of this kind, the court does not weigh the evidence, and if it can be said in connection with the motion at the close of a plaintiff's case that, taking the plaintiff's evidence as true, with all reasonable inferences to be drawn therefrom, it fairly tends to prove the plaintiff's case, the court would not be warranted in excluding the evidence and directing a verdict. On a motion made at the close of all of the evidence, if it can be said that, taking the evidence in its most favorable aspect in connection with the plaintiff's case, it fairly tends to prove his case, the court would not be warranted in directing a verdict. We would therefore not be warranted in reversing the judgment on the rulings of the court on said motions.

It is next insisted on the part of appellant Rockford Public Service Company that the judgment should be reversed as to it with a finding of fact. From what we have already said, it would follow that we would not be warranted in reversing the judgment with a finding of fact as to either of appellants.

The record discloses that on September 27, 1928, appellee, who was then 78 years of age, was riding as a passenger on a street car of the Rockford Public Service Company. Said car was proceeding north and at a point in the intersection of north Church street and Whitman street, a little north of the center of the intersection, the truck in question collided with said street car, striking the same at or near the steps on the right near the front of said car.

Appellee testified that he saw the truck coming and that he got up and the crash followed, and that he was bumped back and forth and struck the outside wall of the car, receiving the injuries for which this suit is brought.

It is also insisted by appellant Rockford Public Service Company that the verdict of the jury as to it is against the manifest weight of the evidence. In this connection, counsel insist that the motorman of said street car was exercising ordinary care in the operation of said street car; that at the time it crossed the southline of Whitman street and entered said intersection, the truck driven by Fairley was from 35 to 75 or 100 feet east of the east rail of said car track and that, notwithstanding that said truck was approaching said intersection from the right, in view of the fact that said street car entered said intersection first, and in view of the location of said vehicles at the time in question, that said street car had the right of way.

The evidence is somewhat conflicting with reference to the location of the truck at the time said street car entered said intersection. All of the witnesses on the part of appellant Public Service Company who saw the collision, and all of the witnesses on the part of appellee, including appellee himself, who testified to having seen the truck prior to the collision, except Marvin Smith, testified that said street car entered the intersection when said truck was from 25 or 30 feet to one-half block east of the east line of said intersection.

On direct examination appellee testified: "The street car

The record discloses that on September 27, 1933, appellee, who was then 73 years of age, was riding as a passenger on a street car of the Rockford Public Service Company. Said car was proceeding north and at a point in the intersection of North Church street and Whitman street, a little north of the center of the intersection, the truck in question collided with said street car, striking the same at or near the steps on the right near the front of said car.

Appellee testified that he saw the truck coming and that he got up and the crash followed, and that he was bumped back and forth and struck the outside wall of the car, receiving the injuries for which this suit is brought.

It is also instated by appellant Rockford Public Service Company that the verdict of the jury as to it is against the manifest weight of the evidence. In this connection, counsel instate that the motorman of said street car was exercising ordinary care in the operation of said street car; that at the time it crossed the southeast of Whitman street and entered said intersection, the truck driven by Fairley was from 25 to 75 or 100 feet east of the east rail of said car track and that, notwithstanding that said truck was approaching said intersection from the right, in view of the fact that said street car entered said intersection first, and in view of the location of said vehicles at the time in question, that said street car had the right of way.

The evidence is somewhat conflicting with reference to the location of the truck at the time said street car entered said intersection. All of the witnesses on the part of appellant Public Service Company who saw the collision, and all of the witnesses on the part of appellee, including appellee himself, who testified to having seen the truck prior to the collision, except Melvin Smith, testified that said street car entered the intersection when said truck was from 25 or 30 feet to one-half block east of the east line of said intersection.

On direct examination appellee testified: "The street car

was a little south of the curb line at the cross street on Church street when I first saw the truck. I think the street car was going pretty close to 25 miles an hour. The truck was quite a little ~~xxx~~ ways down the street. I couldn't say just how far. It looked as though it was coming easy 20 miles an hour."

On cross examination, appellee testified: "When I first saw the truck the street car was about the south side of the intersection and the truck was about a half a block away, * * * I watched the truck closely all the time. I didn't see the driver of the truck do anything after I first saw him. * * *

"Q. He just kept coming right along? A. Yes, sir.

"Q. And he ran into the street car? A. Yes, sir.

* * *.The street car slowed down before it got to the intersection, I heard the brakes put on at the intersection. At this time the truck was quite a ways down the street."

Without going into a further discussion of the evidence, we hold that, as to appellant Rockford Public Service Company, the verdict of the jury was against the manifest weight of the evidence.

It is also contended by both of said appellants that the court erred in permitting appellee's wife to testify on his behalf, over objection.

This witness testified: "He painted the house and ~~pardes~~.

* * * He cut the lawn, raked it, took the entire care of our lake property, such as cutting the grass, raking it, putting the porch screens on, and took charge of keeping it in repair and painting the screens.* * * He took entire care of himself, he shaved himself three times a week and dressed himself. He fed himself and ~~cup~~ his food. The last two or three years he had no pier put in at the lake property. Before that he always put in the pier at the cottage. After the accident he ~~was~~ never dressed himself, he has never put on his overcoat, he has never cut up his food," etc. She further testified: "I have taken him to the doctor's in the car three times a week, to the osteopath two or three times a week, to the barber shop two or three times a week. I have helped him dress. I have put his collar on him, I have put his overcoat on him.

was a little south of the curb line at the cross street on Church street when I first saw the truck. I think the street car was going pretty close to 25 miles an hour. The truck was quite a little ways down the street. I couldn't say just how far. It looked as though it was coming away 20 miles an hour."

On cross examination, appellee testified: "When I first saw the truck the street car was about the south side of the intersection and the truck was about a half a block away. * * * I watched the truck closely all the time. I didn't see the driver of the truck do anything after I first saw him. * * *

"Q. He just kept coming right along?
A. Yes, sir.
Q. And he ran into the street car?
A. Yes, sir.
* * * The street car slowed down before it got to the intersection. I heard the brakes put on at the intersection. At this time the truck was quite a ways down the street."

Without going into a further discussion of the evidence, we hold that, as to appellant Rockford Public Service Company, the verdict of the jury was against the manifest weight of the evidence. It is also contended by both of said appellants that the

court erred in permitting appellee's wife to testify on his behalf, over objection.

This witness testified: "He painted the house and porch. * * * He cut the lawn, raked it, took the entire care of our lake property, such as cutting the grass, raking it, putting the porch screens on, and took charge of keeping it in repair and painting the screens. * * * He took entire care of himself, he shaved himself three times a week and dressed himself. He fed himself and cut his food. The last two or three years he had no pier but in at the lake property. Before that he always put in the pier at the cottage. After the accident he has never dressed himself, he has never put on his overcoat, he has never cut up his food," etc.

She further testified: "I have taken him to the doctor's in the car three times a week, to the osteopath two or three times a week, to the barber shop two or three times a week. I have helped him dress. I have put his collar on him, I have put his overcoat on him."

I have cut up his food. He has never done anything at the lake. Many times he has not even been able to go up there."

It is practically conceded by counsel for appellee that the court erred in permitting appellee's wife to testify, but it is insisted that the same character of testimony was given by appellee and certain other witnesses, and that therefore appellants were not prejudiced by said ruling. While appellee and certain other witnesses did so testify, the jury, on account of the intimate association of husband and wife, would be inclined to give to her testimony greater weight than to that of other witnesses. We would not be inclined to reverse this judgment on account of the error in permitting appellee's wife to testify, but we hold that it was error.

It is next insisted by counsel representing both appellants that the proof with reference to appellee's injuries was of a very unsatisfactory character, and that there is a serious question as to whether or not appellee's injuries were at all serious. The doctors who had examined and treated him all testified to the effect that the symptoms were purely subjective. No serious complaint is made as to the rulings of the court in connection with the testimony of the physicians, or of any of the witnesses with reference to appellee's injuries, except that it is contended that the court, over objections, permitted the witnesses to state their conclusions as to appellee's ability to wait on himself, etc. To what extent, the objections to the rulings of the court are well taken.

It is also insisted that the court erred in permitting Doctor J. P. Gordon, an osteopath, to testify to complaints made by appellee. This objection is not well taken, in view of the fact that this witness' testimony tends to show that such complaints were made when appellee was being examined for the purpose of treatment.

It is next insisted by appellants that the court erred in its rulings on the instructions.

The first instruction given on behalf of appellee pur-

I have cut up his food. He has never done anything at the lake.

Many times he has not even been able to go up there."

It is practically conceded by counsel for appellee that

the court erred in permitting appellee's wife to testify, but it is

insisted that the same character of testimony was given by appellee

and certain other witnesses, and that therefore appellants were

not prejudiced by said ruling. While appellee and certain other

witnesses did so testify, the jury, on account of the intimate

association of husband and wife, would be inclined to give to her

testimony greater weight than to that of other witnesses. We would

not be inclined to reverse this judgment on account of the error

in permitting appellee's wife to testify, but we hold that it was

error.

It is next insisted by counsel representing both appellants

that the proof with reference to appellee's injuries was of a

very unsatisfactory character, and that there is a serious ques-

tion as to whether or not appellee's injuries were at all serious.

The doctors who had examined and treated him all testified to the

effect that the symptoms were partly subjective. No serious con-

plaint is made as to the rulings of the court in connection with

the testimony of the physicians, or of any of the witnesses with

reference to appellee's injuries, except that it is contended that

the court, over objections, admitted the witnesses to state their

conclusions as to appellee's ability to wait on himself, etc. To

that extent, the objections to the rulings of the court are well

taken.

It is also insisted that the court erred in permitting

Doctor J. E. Gordon, an osteopath, to testify to complaints made

by appellee. This objection is not well taken, in view of the

fact that this witness' testimony tends to show that such complaints

were made when appellee was being examined for the purpose of

treatment.

It is next insisted by appellants that the court erred in

its rulings on the instructions.

The first instruction given on behalf of appellee pur-

ported to set forth the averments of the declaration, and to inform the jury with reference to the issues. Thereafter certain instructions were offered by appellee which directed a verdict in the event that the jury found that appellee had proved his case as alleged in the declaration. In this connection it is insisted that the instruction does not correctly set forth the averments of the declaration with reference to the negligence charged; that the averments of the declaration were more or less specific, while the instruction with reference to negligence was quite general. We are inclined to hold that this objection is well taken. We would not be inclined, however, to reverse the judgment if this were the only error in the record.

It is also insisted that this instruction as to the second count would lead the jury to believe that if the Rockford Public Service Company was operating its car at a speed in excess of fifteen miles per hour, that that in and of itself would be negligence. This point is well taken. *Stamas v. Waskow*, 260 App. 364-367; *Harris v. Piggly Wiggly*, 236 App. 392-399; *Stansfield, v. Wood*, 231 App. 586-590.

Counsel for both appellants further contend that appellee's second and fourth instructions were not carefully guarded with reference to the care to be exercised by appellant street car company for the safety of its passengers. We do not think the instructions are as carefully guarded in this connection as they should be, and on a retrial of the cause this objection is not likely to again occur.

It is also insisted that the instruction with reference to the matters to be considered by the jury in determining the amount of their verdict should they find for appellee, was erroneous in stating that the jury "should take into consideration all of the facts and circumstances ~~to be considered by the jury~~ ~~shall~~ as proved by the evidence before them". This point is well taken as the facts and circumstances to be considered by the jury should be limited to the extent of the injury and the

ported to set forth the elements of the declaration, and to inform the jury with reference to the issues. Thereafter certain instructions were offered by appellee which directed a verdict in the event that the jury found that appellee had proved his case as alleged in the declaration. In this connection it is insisted that the instruction does not correctly set forth the elements of the declaration with reference to the negligence charged; that the elements of the declaration were more or less specific, while the instruction with reference to negligence was quite general. We are inclined to hold that this objection is well taken. It would not be inclined, however, to reverse the judgment if this were the only error in the record.

It is also insisted that this instruction as to the second count would lead the jury to believe that if the Rockford Public Service Company was operating its car at a speed in excess of fifteen miles per hour, that that in and of itself would be negligence. This point is well taken. *Green v. Lawson*, 230 App. 264-267; *Smith v. Smith*, 230 App. 262-267; *Greenfield v. Wood*, 231 App. 266-269.

Counsel for both appellants further contend that appellee's second and fourth instructions were not carefully guarded with reference to the care to be exercised by appellant street car company for the safety of its passengers. It is not likely the instructions are as carefully guarded in this connection as they should be, and on a retrial of the case this objection is not likely to again occur.

It is also insisted that the instruction with reference to the matters to be considered by the jury in determining the amount of their verdict should have been directed for appellee, was erroneous in stating that the jury should take into consideration all of the facts and circumstances to determine whether the jury should be limited to the extent of the injury and the loss taken as the facts and circumstances to be considered by the jury.

resultant damages.

It is also insisted that this instruction is erroneous in stating to the jury that appellee might recover what "will be a fair compensation for the injuries he has sustained, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration and proven by the evidence," as there is nothing to show what amount of damages were so claimed. This objection is not serious, for the reason the verdict is for a much less sum than the amount claimed.

Appellee's fourth and eighth instructions are open to the criticism that in a sense they assume negligence on the part of the appellants.

It is insisted by appellant Hughes Putney Company that the seventh instruction is erroneous as to it for the reason that it directs a verdict and is based on the averments of the declaration as set forth in the first instruction. In view of what we have already said, we think this point is well taken.

It is also insisted on the part of the Hughes Putney Company that John R. Fairley was an independent contractor, and that, being such, appellant Hughes Putney Company would not be liable for his negligence.

The truck in question was owned by Fairley but it was loaded by the Hughes Putney Company which furnished someone at the place where it was to be unloaded, to give directions in reference thereto. A number was given to the truck, and it had to take its turn according to number, in getting its load. A record was kept with reference to the number of batches hauled, etc., and the driver was paid accordingly. The record also is to the effect that Fairley could have quit hauling or the Hughes Putney Company could have discharged him at any time. The principal consideration in determining whether a workman is an employee or an independent contractor is the right to control the manner of doing the work. It is not the actual exercise of the right by interfering with the work, but the right to control, which constituted the test. *Decatur Railway Co. v. Industrial Board*, 276 Ill. 472-474; *Bristol* 7.

resultant damages.

It is also insisted that this instruction is erroneous in stating to the jury that appellee might recover what "will be a fair compensation for the injuries he has sustained, if any, as far as such damages and injuries, if any, are claimed and alleged in the declaration and proven by the evidence," as there is nothing to show what amount of damages were so claimed. This objection is not serious, for the reason the verdict is for a much less sum than the amount claimed.

Appellee's fourth and eighth instructions are open to the criticism that in a sense they assume negligence on the part of the appellants.

It is insisted by appellant Hughes Lumber Company that the seventh instruction is erroneous as to it for the reason that it directs a verdict and is based on the averments of the declaration as set forth in the first instruction. In view of what we have already said, we think this point is well taken.

It is also insisted on the part of the Hughes Lumber Company that John E. Fairley was an independent contractor, and that, being such, appellant Hughes Lumber Company would not be liable for his negligence.

The truck in question was owned by Fairley but it was loaded by the appellant company which furnished someone at the place where it was to be unloaded, to give instructions in reference thereto. A contract was given to the truck, and it had to take its turn according to contract, in getting loaded. The record was kept with reference to the number of barrels loaded, etc., and the driver was paid accordingly. The record also is to the effect that

Fairley could have been held liable on the ground that he could have discharged him at any time. The principal consideration in determining whether a person is an employee or an independent contractor is the right to control the manner in which the work is done. It is not the actual exercise of the right of control which determines the work, but the right to control, which constitutes the test. Decatur Railway Co. v. Industrial Board, 278 Ill. 451-452; Mitchell v.

Gale Co., v. Industrial Commission, 292 Ill. 16-21; Franklin Coal Co. v. Industrial Commission, 206 Ill. 329-333; Amalgamated Roofing Co. v. Travelers' Ins. Co., 300 Ill. 487-497. An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the manner by which he attains that result. Jaggard on Torts, sec. 73; Amalgamated Roofing Co. v. Traveler's Ins. Co., supra, 497. The fact that payment is made by the piece or the job or the day or the hour does not necessarily control, where the workman is subject to the control of the employer as an employee and not as a contractor. Decatur Railway Co. v. Industrial Board, supra; Amalgamated Roofing Co. v. Travelers' Ins. Co., supra, 497; Franklin Coal Co. v. Industrial Commission, supra, 334.

The work in this case was simple, and no control would ordinarily be required, except to direct the driver of the truck where to get the gravel and cement and where to unload the same. This control was exercised and, under the holding in Decatur Railway Co. v. Industrial Board, supra, would render the truck driver an employee and not an independent contractor. From a review of the foregoing authorities we hold that Fairley was not an independent contractor, but was an employee of appellant Hughes Putney Company.

We are not called on to determine as to whether the record would sustain a judgment against appellant Hughes Putney Company if it had been sued alone, for the reason that a joint judgment must be affirmed or reversed in its entirety. Seymour v. Richardson Fueling Co., 205 Ill. 77-83; Nordhaus v. Vandalia R. R. Co., 242 Ill. 166-174; Livak v. Chicago & Erie R. R. Co., 299 Ill. 218-226. As to the appellant Rockford Public Service Company, the errors above set forth require a reversal of the judgment, and it will therefore be reversed in its entirety.

Reversed and remanded.

Gale Co., v. Industrial Commission, 282 Ill. 10-21; Franklin Coal Co. v. Industrial Commission, 208 Ill. 326-328; Amalgamated Hoisting Co. v. Travelers' Ins. Co., 200 Ill. 487-497. An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the manner by which he attains that result. *Jaggard on Torts*, sec. 73; Amalgamated Hoisting Co. v. Travelers' Ins. Co., supra, 487. The fact that payment is made by the piece or the job or the day or the hour does not necessarily control, where the workman is subject to the control of the employer as an employee and not as a contractor. *Deaton Railway Co. v. Industrial Board*, supra; Amalgamated Hoisting Co. v. Travelers' Ins. Co., supra, 487; Franklin Coal Co. v. Industrial Commission, supra, 282.

The work in this case was simple, and no control would ordinarily be required, except to direct the driver of the truck where to get the gravel and cement and where to unload the same. This control was exercised and, under the holding in *Deaton Railway Co. v. Industrial Board*, supra, would render the truck driver an employee and not an independent contractor. From a review of the foregoing authorities we hold that *Patney* was not an independent contractor, but was an employee of appellant *Hughes Putney Company*.

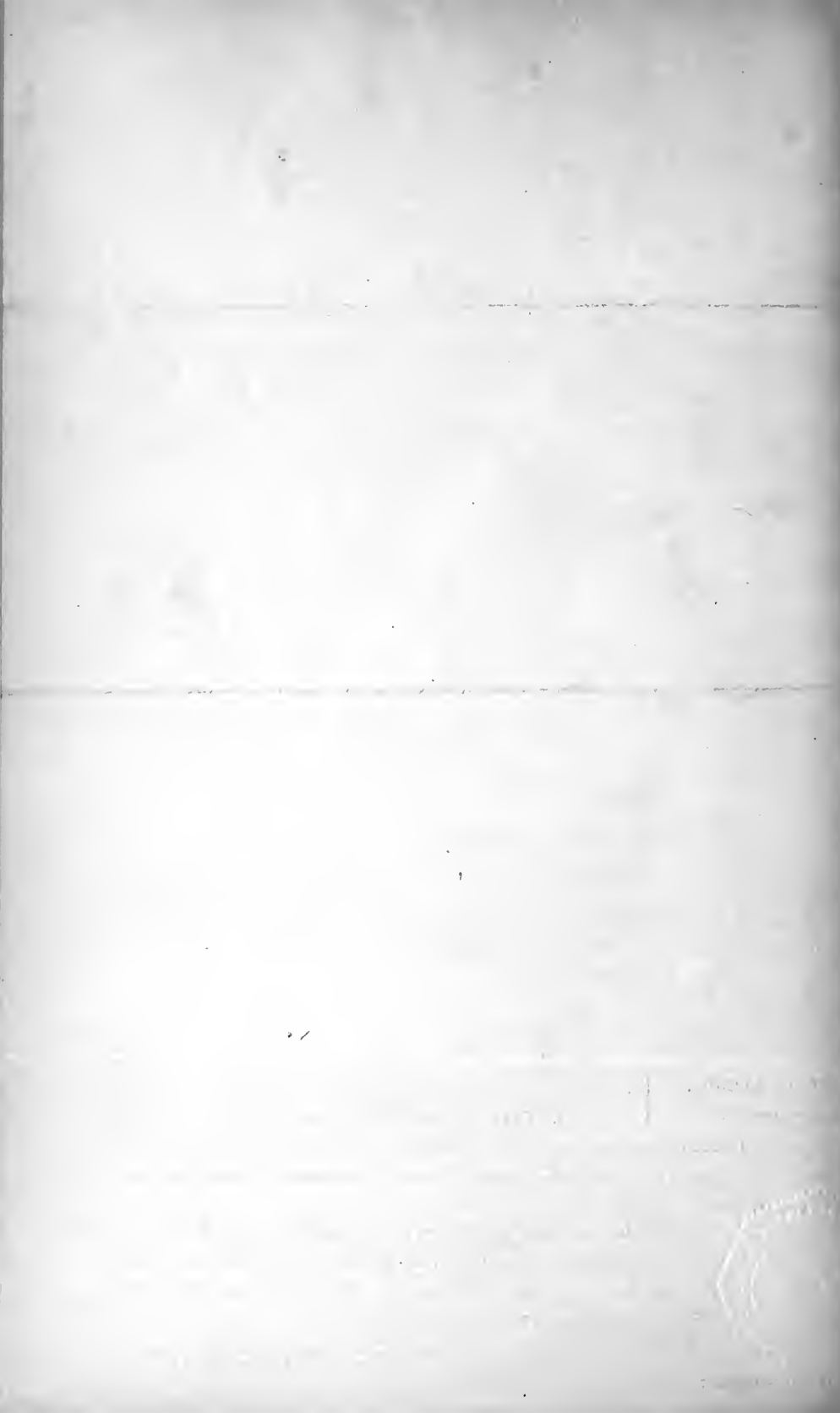
We are not called on to determine as to whether the record would sustain a judgment against appellant *Hughes Putney Company* if it had been made alone, for the reason that a joint judgment must be affirmed or reversed in its entirety. *Deymour v. Richardson*, 202 Ill. 77-80; *Northrup v. Van Buren*, 202 Ill. 218-222. As to the appellant *Richardson Public Service Company*, the errors above set forth require a reversal of the judgment, and it will therefore be reversed in its entirety. Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



4 / AT A TERM OF THE APPELLATE COURT, / 7

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 6324

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 1 1931

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA
FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME
BY JAMES M. SMITH

NEW YORK: PUBLISHED BY

JOHN WILEY & SONS, 15 N. ASSATEZ ST.

NEW YORK

1897

1

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

BY JAMES M. SMITH

NEW YORK: PUBLISHED BY

JOHN WILEY & SONS, 15 N. ASSATEZ ST.

NEW YORK

1897

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

BY JAMES M. SMITH

NEW YORK: PUBLISHED BY

JOHN WILEY & SONS, 15 N. ASSATEZ ST.

NEW YORK

1897

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

BY JAMES M. SMITH

In the Appellate Court
of Illinois
Second District
October Term, A.D. 1930

The People of the State

of Illinois,

Defendant in Error,

vs.

George Henry,

Plaintiff in Error.

Writ of Error to the County

Court of Rock Island

County, Illinois

OPINION by BOGGS, J.

Plaintiff in error, hereinafter called defendant, was tried and convicted in the county court of Rock Island County, on an information charging him with driving an automobile upon a public highway in said county while intoxicated. Defendant was fined \$200 and costs and sentenced to the county jail for thirty days. To reverse said judgment, this writ of error is prosecuted.

The record discloses that the defendant, with one Paul Lamp, was in a cafe in the city of Rock Island about five o'clock in the morning of August 1, 1929. Three police officers testified on the part of the People to the effect that the defendant was in an intoxicated condition while in said cafe; that he was unsteady in his walk, that he spilled his coffee while eating his lunch or breakfast, and that he and Lamp left the cafe and got in a car the defendant had been driving, and started to drive away; that after he had driven some 100 to 200 feet he was placed under arrest. Defendant denied being intoxicated. He was the only witness who testified in his behalf.

It is first contended that the court erred in continuing said cause from November 18 to November 25, 1929, and in allowing the jury, after it had been selected and before being sworn, to

In the Appellate Court
of Illinois
Second District
October Term, A.D. 1930

The People of the State
of Illinois,
Plaintiff in Error,
vs.
George Henry,
Defendant in Error,
County, Illinois
Writ of Error to the County

OPINION BY BOLDS, J.

Plaintiff in error, hereinafter called defendant, was tried and convicted in the county court of Rock Island County, on an information charging him with driving an automobile upon a public highway in said county while intoxicated. Defendant was fined \$200 and costs and sentenced to the county jail for thirty days. To reverse said judgment, this writ of error is presented. The record discloses that the defendant, with one Earl Dams, was in a cafe in the city of Rock Island about five o'clock in the morning of August 1, 1929. Three police officers testified on the writ of the people to the effect that the defendant was in an intoxicated condition while in said cafe; that he was unsteady in his walk, that he spilled his coffee while eating his lunch or breakfast, and that he and Dams left the cafe and got in a car; that the defendant had been driving, and started to drive away; that after he had driven some 100 to 200 feet he was placed under arrest. Defendant denied being intoxicated. He was the only witness who testified in his behalf.

It is first contended that the court erred in conducting a trial from November 12 to November 25, 1929, and in allowing the jury, after it had been selected and before being sworn, to

separate "without admonishing them as to their actions and behavior during the recess of one week."

On the 18th day of November, at the time said cause was continued, the record recites: "And now the jurors are cautioned by the Court as to their duty, and ordered to meet the Court here on the 25th day of November, 1929, at 9 o'clock A. M."

No objection was made by the defendant to said adjournment. On November 25th before the jury were sworn, the State's Attorney and the defendant each stated in substance that there was no objection to the jury. It was not until after the swearing of the jury that any objection was made to proceeding with the trial.

"The separation of a jury without consent is not of itself error and ground for a new trial. It must be shown that the accused was prejudiced by the separation, and that the jury were subjected to some influence which might have operated to the prejudice of the case." *Flanagan v. People*, 214 Ill. 170-180, citing *Marzen v. People*, 190 Ill. 81; *Gott v. People*, 187 Ill. 249; *Adams v. People*, 47 Ill. 376.

There is nothing in the record in this case even tending to show that the defendant was prejudiced by said continuance. The defendant is therefore not in a position to urge this assignment of error with effect.

It is next insisted that the court erred in permitting the State to call Thomas E. Carr, a police officer of said city, for the reason that his name had not been indorsed on the information and no notice had been given that said witness would be called, until the morning of November 25.

Even in felony cases "the People are not restricted to the witnesses on whose testimony the indictment is returned. * * * The circuit court, in the exercise of a sound discretion and having a strict and impartial regard to the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require." *People v. O'Hara*, 332 Ill. 436-447.

separate "without admitting them as to their actions and behavior during the recess of one week."

On the 18th day of November, at the time said cause was continued, the record recites: "And now the jurors are continued by the Court as to their duty, and ordered to meet the Court here

on the 25th day of November, 1880, at 9 o'clock A. M."

No objection was made by the defendant to said adjournment. On November 25th before the jury were sworn, the State's Attorney and the defendant each stated in substance that there was no objection to the jury. It was not until after the swearing of the jury that any objection was made to proceeding with the trial.

"The separation of a jury without consent is not of itself error and ground for a new trial. It must be shown that the accused was prejudiced by the separation, and that the jury were subjected to some influence which might have operated to the prejudice of the case." *Thompson v. People*, 214 Ill. 170-180, citing *Warren v. People*, 190 Ill. 81; *Scott v. People*, 187 Ill. 248; *Adams v. People*, 47 Ill. 378.

There is nothing in the record in this case even tending to show that the defendant was prejudiced by said continuance. The defendant is therefore not in a position to urge this assignment of error with effect.

It is next insisted that the Court erred in permitting the State to call Thomas E. Carr, a police officer of said city, for the reason that his name had not been introduced on the indictment and no notice had been given that said witness would be called, until the morning of November 25.

Even in felony cases "the People are not restricted to the witnesses on whose testimony the indictment is returned." * * * The circuit court, in the exercise of a sound discretion and under a strict and impartial regard to the rights of the community and of the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require." *People v. O'Hara*, 7 Ill.

436-447.

The examination of such witnesses is in the sound discretion of the court, for the exercise of which it has been said error cannot be assigned. *Bulliner v. People*, 95 Ill. 394-402; *Gore v. People*, 162 Ill. 259-265; *People v. Curran*, 286 Ill. 302-311; *People v. Bundy*, 295 Ill. 322-330; *People v. O'Hara*, supra, 447.

The record fails to show that any request was made by the defendant or his counsel for a list of the witnesses that would be offered on the part of the People. This being a misdemeanor, and not a felony case, no error resulted from the action of the court in permitting said witness to testify. *People v. Madruh*, 226 App. 27-30.

It is next contended that the court erred in the admission of testimony on the part of the People. In this connection it is insisted that the court erred in permitting the State to develop that the defendant was in company with the said Paul Lamp. The defendant himself testified on direct examination that he was with Lamp, and that Lamp had been drinking and had requested the defendant to take him to his home. The defendant is therefore not in a position to urge the admission of said testimony as a ground of reversal. Even though the defendant had not gone into the matter himself, there was no error in such ruling. The fact that the defendant was in the cafe in company with Lamp, and that he left the cafe and entered said automobile with him was so connected with said transaction as to be a part thereof. The court did not err in this ruling. *People v. Scott*, 261 Ill. 165-170.

It is also insisted that the court erred in permitting the State's Attorney to cross examine the defendant with reference to his whereabouts preceding the time that he had been seen in said cafe. One of the questions asked the defendant by his counsel on direct examination was with reference to his association with Lamp, and was as follows:

"Q. Had you seen him any time during the evening before?

A. No, not all day."

Q. Had you seen him any time during the evening before?

A. Yes, as follows:

One of the questions asked the defendant by his counsel on direct examination was with reference to his association with Lam, and

whereabouts preceding the time that he had been seen in said city.

State's Attorney to cross examine the defendant with reference to the

It is also testified that the court erred in permitting the

Scott, 281 Ill. 133-137.

a part thereof. The court did not err in this regard. People v.

automobile with him was connected with said transaction as to be

case in company with Lam, and that he left the rule not covered with

was no error in such ruling. The fact that the defendant was in the

Even though the defendant had not gone into the matter himself, there

to urge the admission of said testimony as a ground of reversal.

take him to his home. The defendant is therefore not in a position

and that Lam had been drinking and had requested the defendant to

defendant himself testified on direct examination that he was with Lam,

that the defendant was in company with the said Paul Lam. The de-

instated that the court erred in permitting the State to develop

testimony on the part of the People. In this connection it is

It is now contended that the court erred in the admission of

permitting said witness to testify. People v. Madril, 288 App. 27-30.

not a felony case, no error resulted from the action of the court in

offered on the part of the People. This being a misdemeanor, and

defendant or his counsel for a list of the witnesses that would be

The record fails to show that any request was made of the

v. Bundy, 285 Ill. 322-323; People v. Barker, 287, 288, 289.

People, 162 Ill. 253-255; People v. Quinn, 285 Ill. 307-311; People

not be assigned. People v. People, 281 Ill. 304-305; People v.

of the court, for the exercise of which it has been said error com-

The examination of said witnesses is in the usual character

The period covered by the direct examination warranted the cross examination complained of. In Chicago City Ry. Co. v. Creech, 207 Ill. 400, at page 402 the court says:

"A witness may be cross examined as to his direct testimony in all of its bearings and as to whatever goes to explain or modify or discredit what he had said in his first examination."

There was no substantial error in the ruling of the court in this connection.

It is also insisted that the court erred in its rulings on the closing argument of the State's Attorney. The record fails to disclose the remarks objected to. The defendant is therefore not in a position to successfully urge this assignment of error. People v. Weisman, 296 Ill. 156-162; Hickman v. People, 137 Ill. 85-80; Daxanbeklar v. People, 93 App. 553-555.

It is also insisted that the evidence is not sufficient to support the verdict and judgment. Three witnesses testified on the part of the People, to the effect that the defendant was intoxicated at the time he was arrested. The only testimony in denial thereof was that of the defendant.

"A reviewing court in a criminal case is not warranted in disturbing a verdict or reversing a judgment of conviction on the ground that the evidence is insufficient to convict, unless the verdict is palpably contrary to the weight of the evidence, or the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. People v. Jarecki, 291 Ill. 80; People v. Thompson, 321 Ill. 594." People v. Hicketts, 324 Ill. 170-178.

The evidence fully warranted said verdict and judgment. The court did not err in so ruling.

It is also insisted that the judgment should be reversed for the reason that counsel for defendant states that since said trial he has ascertained that one of the jurors was over 65 years of age.

The period covered by the direct examination warranted the

cross examination complained of. In Chicago City Ry. Co. v.

Greesh, 207 Ill. 400, at page 402 the court says:

"A witness may be cross examined as to his direct testimony

in all of its bearings and as to whatever goes to explain or modify

or discredit what he had said in his first examination."

There was no substantial error in the ruling of the court

in this connection.

It is also insisted that the court erred in its rulings on

the closing argument of the State's Attorney. The record fails to

disclose the remarks objected to. The defendant is therefore not in

a position to successfully urge this assignment of error. People v.

Weisman, 286 Ill. 156-158; Wickman v. People, 137 Ill. 83-80;

Daxambeckler v. People, 93 App. 553-555.

It is also insisted that the evidence is not sufficient to

support the verdict and judgment. Three witnesses testified on the

part of the people, to the effect that the defendant was intoxicated

at the time he was arrested. The only testimony in denial thereof

was that of the defendant.

"A reviewing court in a criminal case is not warranted in

disturbing a verdict or reversing a judgment of conviction on the

ground that the evidence is insufficient to convict, unless the

verdict is palpably contrary to the weight of the evidence, or the

evidence is so unreasonable, trustworthy or unsatisfactory as to justify

its reasonable doubt of the defendant's guilt. People v. Jaroski,

281 Ill. 60; People v. Thompson, 371 Ill. 304; People v. Wickham,

384 Ill. 170-178.

The evidence fully warranted said verdict and judgment. The

court did not err in so ruling.

It is also insisted that the judgment should be reversed for

the reason that counsel for defendant states that since said trial

he has ascertained that one of the jurors was over 35 years of age.

It is conceded that this did not appear on the trial, and that no objection was made to this juror. No proof of any character was offered in substantiation of the defendant's assertion.

Even if the record, by proper proof, disclosed that one of said jurors was past the age of 65 years, unless said juror were challenged for cause, that fact would not render the verdict and judgment erroneous. The maximum age limit for jury service is not a disqualification, but a privilege, which may be claimed by the prospective juror. *Davison v. People*, 90 Ill. 221-225; *People v. Coffman*, 338 Ill. 367-371. This assignment of error is not well taken.

It is also insisted that the court erred in refusing to give defendant's first, second and third refused instructions.

The tendency of defendant's first and third refused instructions would have been to have caused a disagreement on the part of the jury. The court therefore did not err in refusing said instructions. *People v. Lardner*, 296 Ill. 190-194.

Defendant's second refused instruction is as follows:

"A person has the right to resist an unlawful arrest, and may defend himself against assaults made upon his person by an officer or other person seeking to arrest him illegally and without color of authority."

The evidence disclosed that defendant was properly arrested, and there is nothing in the record to show that any unnecessary force was used in connection with the same.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

It is conceded that this did not occur on the trial, and that no objection was made to this juror. The proof of any character was offered in substantiation of the defendant's assertion.

Even if the record, by proper proof, disclosed that one of said jurors was past the age of 65 years, unless said juror were challenged for cause, that fact would not render the verdict and judgment erroneous. The maximum age limit for jury service is not a disqualification, but a privilege, which may be claimed by the prospective juror. *Reynolds v. People*, 80 Ill. 2d 1-23; *People v. Coffman*, 328 Ill. 367-371. This assignment of error is not well taken.

It is also insisted that the court erred in refusing to give

defendant's first, second and third refused instructions.

The tendency of defendant's first and third refused instructions

would have been to have caused a miscarriage of justice on the part of the jury. The court therefore did not err in refusing said instructions. *People v. Gardner*, 295 Ill. 120-124.

Defendant's second refused instruction is as follows:

"A person has the right to resist an unlawful arrest, and may

defend himself against assault made upon his person by an officer or other person seeking to arrest him illegally, and without color of

authority."

The evidence disclosed that defendant was properly arrested,

and there is nothing in the record to show that any unnecessary force was used in connection with the same.

Nothing is reliable error in the record, the judgment of the

trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT }
I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

42 A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 623'

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 17 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In the Appellate Court
of Illinois

Second District

October Term, A. D. 1930.

Bert B. Tucker,

Plaintiff-Appellee,

vs.

Appeal from Circuit Court of

Brady-Waxenberg Company, a
corporation,

Rock Island County.

Defendant-Appellant,

OPINION by BOGGS, J.

An action on the case was instituted by appellee against appellant in the circuit court of Rock Island county, to recover damages for injuries received by appellee, caused by appellant. The declaration, as it stood at the time of the trial, contained three counts, each of which averred due care on the part of appellee and negligent conduct on the part of appellant in the operation of its truck, which it was averred was the proximate cause of appellee's injuries. A jury was waived, and it was stipulated that appellant was guilty of negligence as charged. The only question before the court was as to the amount of appellee's damages. The court assessed the damages at \$1200, and rendered judgment therefor. To reverse said judgment, this appeal is prosecuted.

On September 12, 1929, while appellee was standing at the corner of Seventh avenue and Forty-fourth street in the city of Rock Island, he was struck by the front wheel and fender of appellant's truck, and was knocked down on the sidewalk. Appellee was injured between the knee and hip and on the knee and ankle of the right leg. The driver of the truck took appellee to the hospital, where he was treated by Dr. Koivun until September 30, 1929, at which time he was discharged. He was next treated by Dr. DeSilva, his

In the Appellate Court
of Illinois
Second District
October Term, A. D. 1930.

Bert B. Tucker,

Plaintiff-Appellee,

Appellant from Circuit Court of

vs.

Rock Island County.

Brady-Waxenberg Company, a

corporation,

Defendant-Appellant.

OPINION BY DOUGLAS, J.

An action on the case was instituted by appellee against appellant in the circuit court of Rock Island county, to recover damages for injuries received by appellee, caused by appellant. The declaration, as it stood at the time of the trial, contained three counts, each of which averred due care on the part of appellee and negligent conduct on the part of appellant in the operation of its truck, which it was averred was the proximate cause of appellee's injuries. A jury was waived, and it was stipulated that appellant was guilty of negligence as charged. The only question before the court was as to the amount of appellee's damages. The court assessed the damages at \$1200, and rendered judgment therefor. To reverse said judgment, this appeal is prosecuted.

On September 12, 1929, while appellee was standing at the

corner of Seventh Avenue and Forty-fourth Street in the city of Rock Island, he was struck by the front wheel and fender of appellant's truck, and was knocked down on the sidewalk. Appellee was injured between the knee and hip and on the knee and right leg. The driver of the truck took appellee to the hospital, where he was treated by Dr. Koivun until September 20, 1929, at which time he was discharged. He was next treated by Dr. DeGill, his

family physician. There was a puncture wound on the upper third of the thigh, and a contusion of the right leg and foot, and a swelling under the right knee. Appellee returned to work fifteen days after the accident, and continued to work regularly thereafter. During the time he was not working he received one-half of his regular wages. He was a machinist, thirty-six years of age at the time of the trial.

It is contended on the part of appellant for a reversal of said judgment that the damages were necessarily based in large part on the testimony of Dr. DeSilva to the effect that appellee's injuries were of a permanent character; that this testimony was based on subjective symptoms and was largely of a speculative character. Counsel for appellee in his brief and argument concedes that this point is well taken as to certain of Dr. DeSilva's testimony, but insists that, this being a trial before the court without a jury, it is presumed that the court considered only the competent evidence, and that the competent evidence in the record is sufficient to sustain the judgment, citing *Palmer v. Menden Britannia Co.* 188 Ill. 508-518; *Clark v. Waggoner*, 283 Ill. 199-206; *Allen v. McGill*, 311 Ill. 170-178; *Morgan v. Natl. Trust Bank*, 331 Ill. 182-192; *Rosengren v. Mfgs. Natl. Bank*, 220 App. 608-614. Counsel for appellant concedes that the law is as stated by appellee, but insists that the competent evidence in the record fails to disclose that appellee received any permanent injury, and that the judgment is grossly in excess of appellee's actual damages.

Dr. P. A. Bendixen testified on behalf of appellant that he specialized in bone and joint surgery; that he made a physical examination of appellee on June 7, 1930, and also made an ex-ray examination of him; that "the first test that was made in relation to the flexing of the right knee and the left knee. By actual measurement the left knee flexed 135 degrees and the right knee flexed 135 degrees bringing the flexed muscles into^{play} and body muscles extending the knee without any pain elicited, but the patient acted in perfect condition. Patient was asked to extend his knees in a

family physician. There was a puncture wound on the upper third of the thigh, and a contusion of the right leg and foot, and a swelling under the right knee. Apples returned to work fifteen days after the accident, and continued to work regularly thereafter. During the time he was not working he received one-half of his regular wages. He was a machinist, thirty-six years of age at the time of the trial.

It is contended on the part of counsel for a reversal of said judgment that the damages were necessarily fixed in large part on the testimony of Dr. Desliva to the effect that appellee's injuries were of a permanent character; that this testimony was based on subjective symptoms and was largely of a speculative character. Counsel for appellee in his brief and argument concedes that this point is well taken as to certain of Dr. Desliva's testimony, but insists that, this being a trial before the court without a jury, it is presumed that the court considered only the competent evidence, and that the competent evidence in the record is sufficient to sustain the judgment, citing *Felton v. Nathan Pittman*, 202 Ill. 508-512; *Clark v. Wagoner*, 203 Ill. 100-103; *Allen v. McGill*, 311 Ill. 170-172; *Morgan v. Hall*, 331 Ill. 137-140; *Rosenberg v. Migma*, 331 Ill. 200-204. Counsel for appellee concedes that the law is as stated by appellee, but insists that the competent evidence in the record fails to disclose that appellee received any permanent injury, and that the judgment is grossly in excess of appellee's actual damages.

Dr. B. A. Bergman testified in behalf of appellee that he specialized in bone and joint surgery; that he made an x-ray examination of appellee on June 7, 1929, and also made an x-ray examination of him; that the first x-ray was made in relation to the flexion of the right knee and the left knee. He also examined the left knee flexed 135 degrees and the right knee flexed 135 degrees bringing the flexed muscles into and from a static extension the knee without any pain elicited, but the plaintiff asked

straight line and extended both knees in an equal extension, showing there was no limits on extension. The patient was then requested to stand on one leg and bend to the floor, flexing the ankle to about 150 degrees, the leg then being flexed at an angle to the thigh and the thigh brought to a right angle to overcome equilibrium. That was done to the right leg and the patient experienced no pain; and stood on knee and put leg out to the side and no pain experienced on the opposite side. I asked the patient if it caused any pain. He said it did not and these tests indicated there was no swelling, no adhesion and the muscles subjected were working and the joints themselves were not producing any interference and if there had been any thrombus a person could have gone through these tests without eliciting pain either facial or verbal. It is my opinion that the man has no pain and will not have in the future."

Dr. Koivun testified that he examined appellee on September 12, 1929, and "found a slight laceration or puncture wound on the upper third of the thigh, about the size of a nickle. There was very little bleeding and no vein was lacerated. There was a contusion of the right leg and the right foot. I dressed him for about two weeks and discharged him on September 30, 1929, to return to work, October 1st, which he did. My treatments consisted of just ordinary dressings; I found no hard indurated swelling of the external saphenous vein; there was some swelling at the side of the puncture on the thigh with no definite sign of any thrombus. I could not see where there was any permanent disability. From the results of the examination there was no functional disuse, the parts had recovered and were in good shape. There is nothing in the condition of the right leg to cause pain or suffering at this time. When I examined the plaintiff in the fall of 1929 I did not find any danger of embolism resulting from the wound and it was my opinion that embolism would not follow. From statistics the hazard of embolism is very small and as time ensues after the happening of an accident chances of embolism decrease. I at no time suspected a thrombus in this case."

Dr. DeSilva had testified on behalf of appellee to the effect that he saw appellee first on October 8, 1929, when he made his examination, and "found a hard, indurated swelling of the external saphenous vein under the right knee, with some discoloration and oedema. There was no injury to the bone. I saw the plaintiff every other day and sometimes three or four days. On the third visit there was a gradual lessening of the swelling which has been about the condition more or less up until the present time. The pain accompanying such an injury is sometimes slight. The reduction of the swelling was all that could be determined objectively. The other symptoms being purely subjectively; the condition of the patient's leg on the fourth visit could cause a dull aching pain. On subsequent visits there was no difference in treatment. There is a slight hardness of the external saphenous vein."

Upon being asked if there was any apparent injury, the doctor answered: "No, it is hardly perceptible, but extremely hazardous, yet would not be shown by any means of physical examination. X-rays would not show the condition I described." Over objection, he also stated: "My own opinion is that the injury may be permanent and will persist through life. That is as far as human judgment goes." Over objection, he further testified that appellee "will require further medical services for troubles that will come as a direct result of these injuries to his vein." He was asked this question: "As he grows older, have you an opinion as to whether that pain will be greater or less?" His answer was, "it may be either greater or less." He was also asked: "Are you able to say with reasonable certainty whether or not the plaintiff as he grows older will suffer other damage as the result of this injury?" Over objection, he answered: "Yes." He further stated: "My opinion is that the danger of emboli is great and continuous throughout his entire life. By emboli I mean the obstruction of the vascular system as the result of a plug carried in the blood stream. The result is the heart may become gangrenous and the septic emboli in the blood stream cause

Dr. Desliva had testified on behalf of appellee to the effect that he saw appellee first on October 3, 1939, when he made his examination, and "found a hard, indurated swelling of the external saphenous vein under the right knee, with some discoloration and edema. There was no injury to the bone. I saw the plaintiff every other day and sometimes three or four days. On the third visit there was a gradual lessening of the swelling which had been about the condition more or less up until the present time. The pain accompanying such an injury is sometimes slight. The reduction of the swelling was all that could be determined objectively. The other symptoms being purely subjectively; the condition of the patient's leg on the fourth visit could cause a dull aching pain. On subsequent visits there was no difference in treatment. There is a slight tenderness of the external saphenous vein."

Upon being asked if there was any apparent injury, the doctor answered: "No, it is hardly perceptible, but extremely hazardous, yet would not be shown by any means of physical examination. X-rays would not show the condition I described." Over objection, he also stated: "My own opinion is that the injury as he presented and will persist through life. Just as far as human judgment goes." Over objection, he further testified that appellee "will require further medical services for troubles that will come as a direct result of these injuries to his vein." He was asked this question: "As he grows older, have you an opinion as to whether that pain will be greater or less?" He answered: "It may be either greater or less." He was also asked: "Are you able to say with reasonable certainty whether or not the plaintiff as he grows older will suffer other damage as the result of this injury?" Over objection, he answered: "Yes." He further stated: "My opinion is that the danger of emboli is great and continuing through his entire life. By emboli I mean the obstruction of the vascular system as the result of a plug carried in the blood stream. The result is the heart may become hypertrophied and the aortic emboli in the blood stream may

sudden death. The infected tissue breaking off the lining of the heart will get in the blood stream and life be immediately ended."

Without quoting further from the testimony of this witness, it is clear that it was speculative in character, and not proper to be considered in estimating appellee's damages. *Lauth v. Chicago U. T. Co.*, 244 Ill. 244-250; *Kimbrough v. Chicago City Ry. Co.*, 272 Ill. 71-76; *Lyons v. Chicago City Ry. Co.* 258 Ill. 75-80; *Boss v. Illinois C. R. R. Co.*, 221 App. 504-513; *O'Donnell v. Snyder*, 231 App. 581-583.

While it is assumed that a court does not consider incompetent evidence, where there is sufficient competent evidence to sustain a finding and judgment, we hold that the competent evidence in this record does not warrant a judgment of \$1200. The evidence discloses that appellee's injuries were not serious. The total amount incurred for doctor bills and medicines did not exceed \$110. Appellee returned to his work within fifteen days after his injury.

Ordinarily, where the damages are unliquidated, if the reviewing court determines that they are so excessive that the judgment can not stand, the judgment is reversed and the cause remanded. Inasmuch, however, as this cause was tried by the court, we have deemed best to affirm the judgment on remittitur. If a remittitur of \$600 is entered within twenty days from the filing of this opinion, reducing the judgment to \$600, the same ^{is} to stand affirmed; otherwise to be reversed and remanded.

Affirmed with remittitur; otherwise reversed and remanded.

and death. The infected tissue breaking off the lining of the heart will get in the blood stream and life be immediately ended. Without quoting further from the testimony of this witness,

it is clear that it was speculative in character, and not proper to be considered in estimating appellee's damages. *Dunth v. Chicago*, U. T. Co., 246 Ill. 344-350; *Hindman v. Chicago City Ry. Co.*, 273 Ill. 71-75; *Ivory v. Chicago City Ry. Co.*, 288 Ill. 73-80; *Boas v. Illinois C. & N. R. Co.*, 381 App. 504-513; *O'Donnell v. Snyder*, 331 App. 581-583.

While it is assumed that a court does not consider incompetent evidence, where there is sufficient competent evidence to sustain a finding and judgment, we hold that the competent evidence in this record does not warrant a judgment of \$1200. The evidence discloses that appellee's injuries were not serious. The total amount incurred for doctor bills and medicines did not exceed \$110. Appellee returned to his work within fifteen days after his injury.

Ordinarily, where the damages are undisputed, if the reviewing court determines that they are so excessive that the judgment can not stand, the judgment is reversed and the cause remanded. Inasmuch, however, as this cause was tried by the court, we have deemed best to affirm the judgment on remittitur. If a remittitur of \$800 is entered within twenty days from the filing of this opinion, reducing the judgment to \$800, the same shall stand affirmed; otherwise to be reversed and remanded.

Affirmed with remittitur; otherwise reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

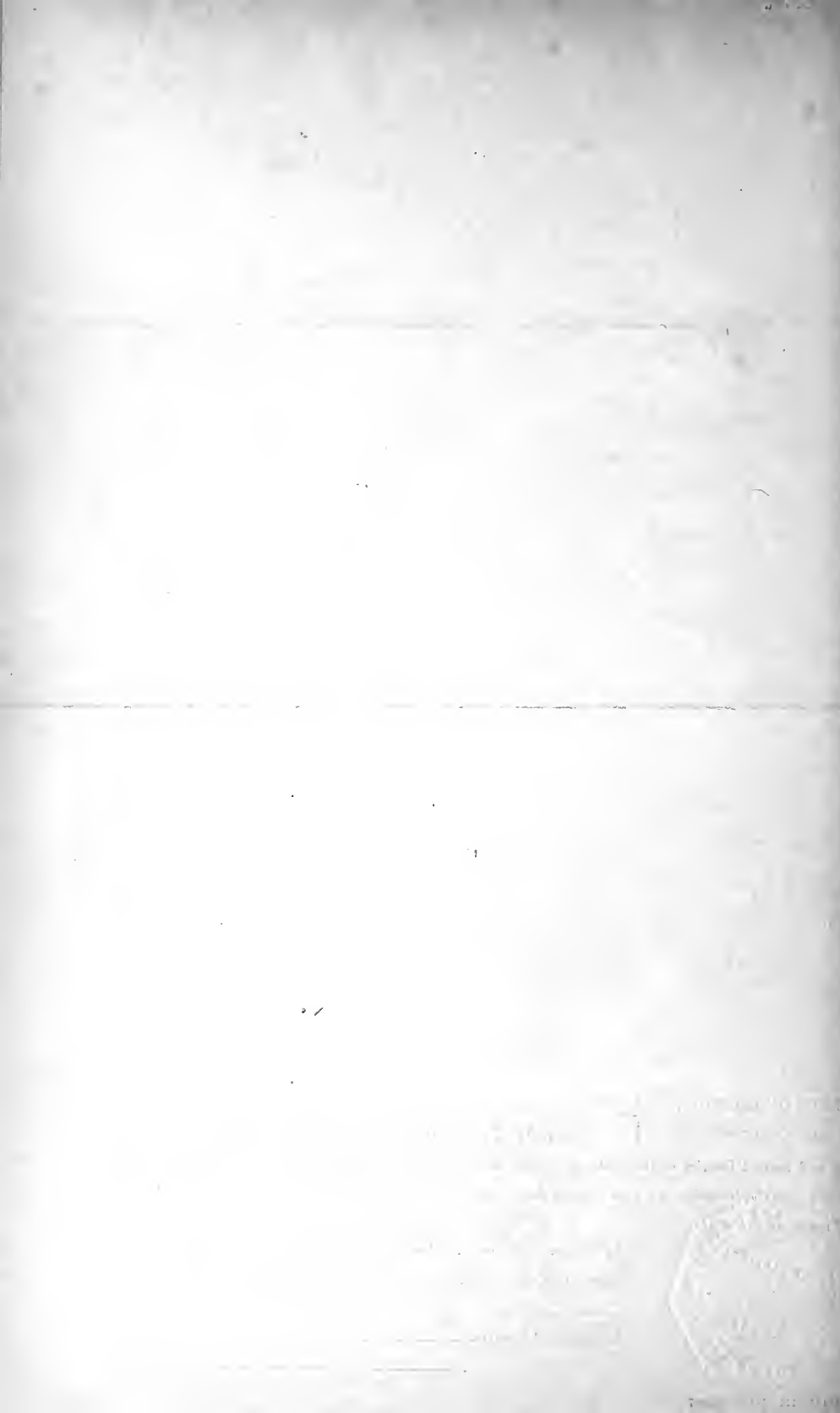
} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 533²

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 5 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

before and held at Ocala on Tuesday, the 11th day of November, 1902, the year of our Lord one thousand nine hundred and two, within and for the circuit of the State of Florida.

Present--The Hon. THOMAS W. VAIL, Presiding Justice.

Hon. JOHN D. TOWNE, J. C.

Hon. FRANKLIN E. BROWN, J. C.

JUSTICE A. JOHNSON, J. C.

E. J. WELLS, Clerk.

BE IT REMEMBERED, that at a term of said court, held at

the city of Ocala, Florida, on the 11th day of November, 1902,

the Clerk's office of said court, in the presence of

following, to-wit:

Freeman Coleman, by his
father and next friend,
Earl Coleman,

appellee,

Appeal from the Circuit Court
of Winnebago County.

vs.

Rockford Public Service Company,
a corporation,
appellant,

Jones, J:

Freeman Coleman recovered a judgment for \$1900.00 and costs against Rockford Public Service Company on account of personal injuries averred to have been sustained by him in a collision between an automobile in which he was riding and a bus owned by the defendant.

The collision occurred about nine-thirty o'clock in the morning on July 28th, 1929. Plaintiff's lower jaw was fractured and he lost ten teeth. He was a minor, eleven years of age, and in the fourth grade at school. He was a passenger in the front seat of a Dodge automobile then being driven by his aunt, Lenora Critchfield. Three other persons were riding in the back seat. The place of the accident was at the intersection of Fifteenth Avenue and Magnolia Street in the City of Rockford. Fifteenth Avenue runs east and west and Magnolia Street runs north and south. The automobile was being driven west on Fifteenth Avenue. The bus was turning from Magnolia Street east into Fifteenth Avenue. The relative positions of the bus and the automobile and their respective speeds is in dispute.

The testimony shows that just before the collision, plaintiff reached for and attempted to set the emergency brake on the automobile. Under the present record, it cannot be said that the plaintiff was guilty of contributory negligence, or that

Freeman Coleman, by his
father and next friend,
Earl Coleman,

appellee,

vs.

Rockford Public Service Company,
a corporation,
appellant.

Jones, J.

Freeman Coleman recovered a judgment for \$1800.00 and
costs against Rockford Public Service Company on account of
personal injuries averred to have been sustained by him in a
collision between an automobile in which he was riding and a
bus owned by the defendant.

The collision occurred about nine-thirty o'clock
in the morning on July 28th, 1922. Plaintiff's lower jaw was
fractured and he lost ten teeth. He was a minor, eleven years
of age, and in the fourth grade at school. He was a passenger
in the front seat of a Dodge automobile then being driven by
his aunt, Lena Gitchell. Three other persons were riding
in the back seat. The place of the accident was at the inter-
section of Fifteenth Avenue and Marshall Street in the city
of Rockford. Fifteenth Avenue runs east and west and Marshall
Street runs north and south. The automobile was being driven
west on Fifteenth Avenue. The bus was turning from Marshall
Street east into Fifteenth Avenue. The relative positions
of the bus and the automobile and their respective speeds
is in dispute.

The testimony shows that just before the collision,
plaintiff reached for and attempted to get the emergency brake
on the automobile. Under the present record, it cannot be said
that the plaintiff was guilty of contributory negligence, or that

he was not in the exercise of due care for his own safety at and prior to the collision. The testimony on the part of plaintiff was sufficient to require a submission of the case to a jury, and it would have been error for the court to have directed a verdict.

The trial court properly refused to admit in evidence three photographs, offered by defendant, showing the bus located at a certain point in Magnolia Street. Plaintiff's witnesses denied that the bus stopped at that point and defendant's witnesses did not agree as to the location. Photographs taken long after an accident should not be admitted in evidence, unless the proof is reasonably clear that the situation at the time they were taken is substantially the same as it was at the time of the accident. (Wabash N. B. Co. v. Farrell, 79 Ill. App. 508; Iroquois Furnace Company v. McGree, 191 Ill. 340; Lips v. Chicago City Ry. Co., 209 Ill. App. 332.)

Complaint is made of plaintiff's first given instruction on three grounds: first, because it fails to particularize all of the elements necessary to be considered in determining what care should have been exercised by the plaintiff, a child eleven years of age; second, because it assumes the individual negligence of the defendant's driver and also the combined negligence of the defendant's driver and Lenora Critchfield, the driver of the automobile; and third, because it refers the jury to the declaration to ascertain the nature and character of the negligence charged.

As to the first ground, it is apparent that the instruction does not sufficiently particularize all of the elements necessary to define the care required of the plaintiff; but whatever defect there is in this regard was cured by instruction numbered 7 given on behalf of the defendant, which fully sets out all of the essentials.

He was not in the custody of the State at his own request and prior to the collision. The testimony on the part of Plaintiff was sufficient to require a submission of the case to a jury, and it would have been error for the court to have directed a verdict.

The trial court recently refused to admit in evidence three photographs, offered in rebuttal, showing the location at a certain point in Lincoln Street. Plaintiff's witnesses denied that the lot depicted in that photograph was vacant; witnesses did not come to the location. Photographs taken long after an accident, which is not admitted in evidence, may lose the force of responsibility when the situation of the time they were taken is substantially the same as it was at the time of the accident. (Hartford v. Hartford, 70 Ill. 508; Insurance Company v. Hartford, 101 Ill. 230; also v. Chicago City Ry. Co., 102 Ill. 407.)

[illegible]

As to the second ground, the instruction concludes with the following charge: "And if you further believe from a preponderance of the evidence that Freeman Coleman was injured on account of the negligence of the defendant, as charged in the declaration, or on account and by reason of the combined negligence of the servant of the defendant and Lenora Critchfield, then you will find for the plaintiff." Whether or not the instruction contains an assumption that the servant of the defendant was individually negligent, as charged in the declaration, there is no room to deny that the instruction positively assumes combined negligence of the defendant's servant and Lenora Critchfield.

It is conceded that the plaintiff was injured in the collision between the defendant's bus, driven by its servant, and the automobile driven by Lenora Critchfield. Then if their combined negligence be assumed, as it was in this instruction, there could be no escape from a verdict in behalf of the plaintiff. Courts are not disposed to require absolute and technical accuracy in instructions, for that would often defeat the ends of justice. But so long as our system of jurisprudence requires the court to instruct the jury as to the law, it must be presumed that the instructions are followed, especially where they are directory. If this instruction was followed, as we must presume it was, the jury was told, as a matter of law, that the combined negligence of the defendant's servant and Lenora Critchfield had been established by the evidence. Such instructions as this have been uniformly held to constitute reversible error. (Anderson v. Moore, 108 Ill. App. 108; M. & O. R. R. Co. v. Haley, 100 Ill. App. 588; Morsen v. Deviller, 212 Ill. App. 208; Grifenhagen v. Chicago Ry. Co. 299 Ill. 590; Woods v. C. R. & Q. R. R. Co., 306 Ill. 217.)

As to the impropriety of referring the jury to the declaration to ascertain its averments or charges, we need to

As to the second ground, the instruction concludes
with the following charge: "And if you further believe from a
preponderance of the evidence that Freeman Coleman was injured
on account of the negligence of the defendant, as charged in the
declaration, or on account and by reason of the combined negli-
gence of the servant of the defendant and Lemora Critchfield,
then you will find for the plaintiff. Whether or not the in-
struction contains an assumption that the servant of the de-
fendant was individually negligent, as charged in the declara-
tion, there is no room to deny that the instruction positively
assumes combined negligence of the defendant's servant and
Lemora Critchfield. It is conceded that the plaintiff was injured in the
collision between the defendant's bus, driven by its servant,
and the automobile driven by Lemora Critchfield; then if their
combined negligence be assumed, as it was in this instruction,
there could be no recovery from a verdict in behalf of the plain-
tiff. Courts are not disposed to require absolute and technical
accuracy in instructions, for that would often defeat the ends
of justice. But as long as our system of jurisprudence requires
the court to instruct the jury as to the law, it must be pre-
sumed that the instructions are followed, especially where
they are directory. If this instruction was followed, as we
must presume it was, the jury was told, as a matter of law,
that the combined negligence of the defendant's servant and
Lemora Critchfield had been established by the evidence. Such
instructions as this have been uniformly held to constitute
reversible error. (Anderson v. Moore, 108 Ill. App. 108;
M. & O. R. R. Co. v. Haley, 100 Ill. App. 588; Norton v.
Deviller, 218 Ill. App. 208; Critchman v. Chicago Ry. Co.
229 Ill. 200; Woods v. O. & N. R. Co., 200 Ill. 217.)
As to the propriety of requiring the jury to the
instruction to ascertain the negligence or charges, we need to

cite only one of the many cases upon the subject. (Krieger v. A. E. & C. R. R. Co., 242 Ill. 544.) While instructions which do make such reference have been frequently criticized and should not be given, still we have never reversed a judgment solely for that error.

The second instruction given on behalf of the plaintiff is subject to much of the criticism which has been made against the first instruction. It should not have been given in its present form.

The third instruction given was approved in Bernier v. I. C. R. R. Co., 296 Ill. 434.

Because of the indicated errors, the judgment is reversed and remanded.

Reversed and remanded.

the only one of the two who was not a member of the
the first of the two who was not a member of the

the first of the two who was not a member of the
the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the
the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the

the first of the two who was not a member of the

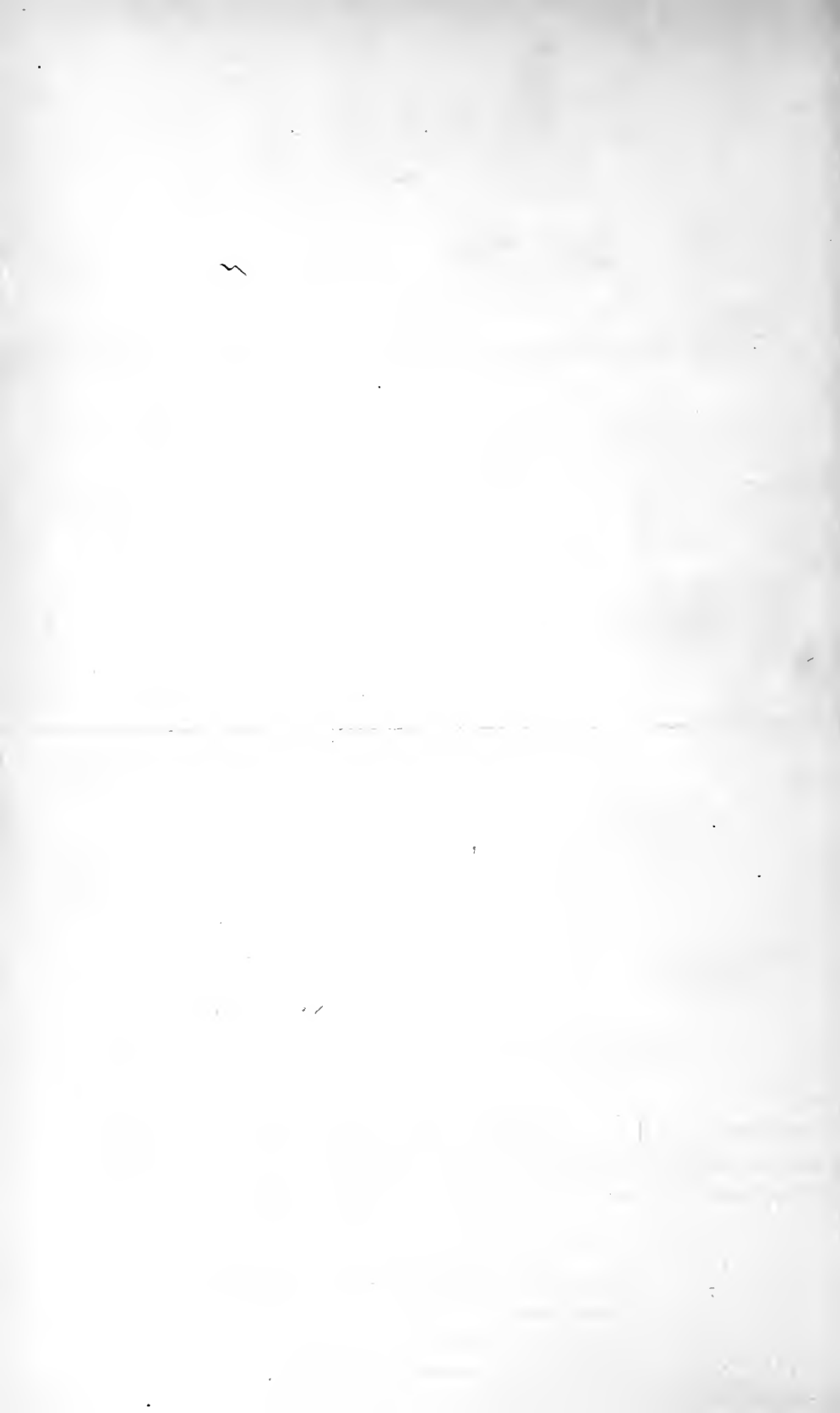
the first of the two who was not a member of the

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



977
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 633³

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 17 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one,

within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HARRY H. BALDWIN, FOR
THE USE OF CHARLES F.
WARD,

Appellee

vs.

WILLIAM W. HIXSON AND
STELLA G. HALL,

Appellants,

Appeal from the Circuit

Court of Winnebago County.

JETT, P. J.

This action of debt on a replevin bond was instituted by Harry H. Baldwin for the use of Charles F. Ward, appellee, against William W. Hixson and Stella G. Hall, appellants. The replevin bond was in the usual form. It provided, among other things, that Hixson, the plaintiff in the replevin suit, should pay "all costs and damages occasioned by the wrongful suing out of said writ of replevin." The only item claimed by appellee in this suit is attorneys' fees for the attorneys of Ward in the replevin suit. A jury was waived and the cause was heard by the court with a finding in favor of appellee and against the appellants for \$300.00 damages as attorneys' fees and appellants prosecuted this appeal.

The replevin suit in which the bond was given and declared upon in this cause was instituted by Hixson against Ward for the recovery of an automobile. The replevin suit was tried in the Circuit Court of Winnebago County upon a stipulation of facts with a finding in favor of Hixson. On appeal to this court it was found that Ward was the owner of and entitled to the possession of the automobile and the judgment of the Circuit Court of Winnebago County was reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Appellate Court and for hearing on the question of damages in accordance with the

HARRY H. BALDWIN, FOR
THE USE OF CHARLES F.
WARD,

Appellee

Appeal from the Circuit
Court of Winnebago County.

WILLIAM W. HIXSON AND
STELLA G. HALL,

Appellants,

JURY, P. 1.

This action of debt on a recognizance bond was instituted by Harry H. Baldwin for the use of Charles F. Ward, appellee, against William W. Hixson and Stella G. Hall, appellants. The recognizance bond was in the usual form. It provided, among other things, that Hixson, the plaintiff in the recognizance suit, should pay "all costs and damages occasioned by the wrongful suit and of said writ of recognizance." The only item claimed by appellee in this suit is attorneys' fees for the recovery of said writ of recognizance. A jury was waived and the case was heard by the court with a finding in favor of appellee and against the appellants for \$300.00 damages as attorneys' fees and expenses incurred this appeal.

The recognizance suit in which the bond was given and declared upon in this case was instituted by Hixson against Ward for the recovery of an automobile. The recognizance suit was tried in the Circuit Court of Winnebago County upon a stipulation of facts with a finding in favor of Hixson. On appeal to this court it was found that Ward was the owner of and entitled to the possession of the automobile and the judgment of the Circuit Court of Winnebago County was reversed and the case remanded for further proceedings not inconsistent with the opinion of the Court. The court and for hearing on the question of damages in accordance with the

stipulation of the parties. Hixson v. Ward, 254 Ill. App. 505.

In the Circuit Court of Winnebago County on the trial of the replevin suit among other things it was stipulated, "It is further stipulated and agreed by and between the parties hereto, that in the event the court shall find for the defendant, G. F. Ward, and shall order that possession of said car be delivered to him, that the defendant shall have the right to submit to the court without a jury the issues of damages, if any, which may have been caused on account of the replevin of the automobile in question, and either party shall have the right to introduce such competent evidence on such an issue of damages as he shall see fit."

After the reversal of the cause by the Appellate Court further proceedings were had in the Circuit Court of Winnebago County based upon the above stipulation. On the hearing in the Circuit Court a finding was had assessing the damages of Ward at the sum of \$714.50. The court recited in its findings and in its assessment of damages the following: "Being the fair cash market value of the automobile in question on January 7th, 1928, including all interest at the rate of 5% for the loss of the use thereof." Thereupon Ward moved the court to include in the assessment of said damages a reasonable amount as and for his attorney's fees, and the court stated that it did not have jurisdiction to enter a judgment to include attorneys' fees either under the law or under the stipulation made between the parties hereto." No appeal was taken from the judgment of the Circuit Court assessing the damages at \$714.50, and the refusal to assess any damages for attorneys' fees.

It will be observed from an examination of the stipulation that it was agreed by and between the parties to said cause that in the event the court should find for the defendant Ward, and should order possession of the car delivered to him, that he should "have the right to submit to the court, without a jury, the issue of damages, if any, which may have been caused on account of the replevin of the automobile in question, and either party shall have the right

attestation of the parties. Wilson v. Ward, 284 Ill. App. 503.

In the event of a judgment in favor of the plaintiff, the plaintiff will be entitled to recover the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff will be entitled to recover the costs of the litigation. In the event of a judgment in favor of the defendant, the defendant will be entitled to recover the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the defendant will be entitled to recover the costs of the litigation. In the event of a judgment in favor of the plaintiff, the plaintiff will be entitled to recover the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff will be entitled to recover the costs of the litigation. In the event of a judgment in favor of the defendant, the defendant will be entitled to recover the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the defendant will be entitled to recover the costs of the litigation.

After the hearing of the cause by the court, the court proceeded to pass upon the evidence presented by the parties. The court found that the plaintiff had established its case by a preponderance of the evidence. The court awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation.

It will be observed that the plaintiff has established its case by a preponderance of the evidence. The court awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation. The court also awarded the plaintiff the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment, and the plaintiff's costs of the litigation.

to introduce such competent evidence on such an issue of damages as they shall see fit." The stipulation was broad enough to include all damages that might accrue by reason of the wrongful suing out of the replevin suit, and gave each party to the cause the right to introduce such competent evidence on the issue of damages as he should see fit to introduce. We are of the opinion that under the stipulation the court should have assessed as a part of the damages of appellee his attorneys' fees, and having failed to do so, if appellee was not satisfied with said finding and judgment, he should have appealed therefrom. The court had full jurisdiction by virtue of said stipulation to assess all the damages which appellee was entitled to receive .

We think appellee misconceived his remedy when he brought suit on the bond and that the judgment of the trial court should be reversed.

Judgment reversed.

to introduce such competent evidence on such an issue of damages as they shall see fit." The stipulation was broad enough to include all damages that might accrue by reason of the wrongful taking out of the respondent suit, and gave each party to the cause the right to introduce such competent evidence on the issue of damages as he should see fit to introduce. We are of the opinion that under the stipulation the court should have assessed as a part of the damages of appellee his attorneys' fees, and having failed to do so, if appellee was not satisfied with said finding and judgment, he should have appealed therefrom. The court had full jurisdiction by virtue of said stipulation to assess all the damages which appellee was entitled to receive.

We think appellee misconceived his remedy when he brought suit on the bond and that the judgment of the trial court should be reversed.

Judgment reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 333⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 17 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

AT A TERM OF THE APPELLATE COURT

begun and held at Ottawa on Tuesday the 1st day of January 1907
the year of our Lord one thousand nine hundred and seven
and the year of the Republic of the United States of America
the first year of the second session of the Sixty-ninth Congress

Present--The Hon. Chief Justice of the Supreme Court of the United States

The Hon. Justice of the Supreme Court of the United States

The Hon. Justice of the Supreme Court of the United States

The Hon. Justice of the Supreme Court of the United States

The Hon. Justice of the Supreme Court of the United States

BE IT REMEMBERED

IN WITNESS WHEREOF

the Clerk of the said Court has hereunto set his hand and seal

at the City of Washington this 1st day of January 1907

Witness my hand and seal this 1st day of January 1907

2

FRED EHRENHART,

Appellee,

vs.

FRED MCGUIRE,

Appellant

Appeal from

Circuit Court of

Knox County, Illinois.

BOGGS, J.

A appellee instituted suit before a justice of the peace of Knox county to recover for services rendered appellant. Appellant filed a counter claim, and a trial was had before a jury, resulting in a verdict in favor of appellee for \$92.42. Judgment was rendered thereon. On appeal to the circuit court, a trial was had, resulting in a verdict and judgment for said amount of \$92.42. To reverse said judgment, this appeal is prosecuted.

The only assignment of error argued is that the verdict is against the manifest weight of the evidence. Appellee testified that he was a brick mason and that during the years 1925 and 1926 he, with his helper, did certain work for appellant; that he kept an account of his work and of the amounts paid him, and that there was a balance due him of \$92.42. This testimony was admitted without objection.

Appellant's counter-claim was for \$300. His testimony was to the effect that he had overpaid appellee something over \$300, but that on account of the suit being brought before a justice, he reduced his claim to said amount. Appellant also testified that he kept a book account, which he offered in evidence, together with certain checks, etc., which he had paid to appellee. He further testified that appellee did not pay the helper, but that the helper was paid by appellant.

Appellee and appellant were the only witnesses who testified. Their evidence is conflicting. If the jury believed the

FRED EHRHART,

Appellee,

vs.

FRED MCQUEEN,

Appellant

Appeal from

Circuit Court of

Knox County, Indiana.

BOGGS, J.

A appellee instituted suit before a Justice of the Peace of Knox County to recover for services rendered appellee. Appellant filed a counter claim, and a trial was had before a jury, resulting in a verdict in favor of appellee for \$22.42. Judgment was rendered thereon. On appeal to the circuit court, a trial was had, resulting in a verdict and judgment for said amount on \$22.42. To reverse said judgment, this appeal is prosecuted. The only assignment of error argued is that the verdict is against the manifest weight of the evidence. Appellee testified that he was a brick mason and that during the years 1923 and 1924 he, with his father, did certain work for appellee; that a part on account of his work and of the amounts said in, and that there was a balance due him of \$22.42. This testimony was admitted without objection. Appellant's counter-claim was for \$200. His testimony was to the effect that he had overpaid appellee something over \$200, but that on account of the suit being brought before a Justice, he reduced his claim to said amount. Appellant also testified that he kept a book account, which he offered in evidence, together with certain checks, etc., which he had said to appellee. He further testified that appellee did not pay the balance, but that the balance was paid by appellee. Appellee and appellant were the only witnesses who testified. Their evidence is conflicting. It is the duty of the

testimony of appellee, he was entitled to recover. Two juries have heard the evidence, and both have found for appellee for a like amount. The trial judge in the circuit court saw and heard the witnesses, and denied the motion for a new trial and entered judgment on the verdict. In this state of the record we would not be warranted in disturbing the verdict, unless we are able to say that it is manifestly against the weight of the evidence. *Piper v. Andricks*, 209 Ill. 564-566; *French v. French*, 215 Ill. 470-473. From an examination of the record, as set forth in the abstract, we are not prepared to say that the verdict is against the manifest weight of the evidence. Other errors were assigned, but were not argued. They are therefore taken as waived.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

testimony of appellee, he was entitled to recover. The jury
have heard the evidence, and both have found for appellee for a
like amount. The trial judge in the circuit court saw and heard
the witnesses, and denied the motion for a new trial and entered
judgment on the verdict. In this state of the record we would not
be warranted in disturbing the verdict, unless we are able to say
that it is manifestly against the weight of the evidence. *Shaw v.*
Archibald, 205 Ill. 584-588; *Trench v. Trench*, 212 Ill. 47-475.
From an examination of the record, as set forth in the abstract, we
are not prepared to say that the verdict is against the manifest
weight of the evidence. Other errors were assigned, but were not
argued. They are therefore taken as waived.
For the reasons above set forth, the judgment of the
trial court will be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



1137
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

26071.5335

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 25 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE HISTORY OF THE

AMERICAN PEOPLE

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME
BY J. W. FULTON
IN TWO VOLUMES
VOL. I
FROM THE FIRST SETTLEMENTS TO THE REVOLUTION
NEW YORK: PUBLISHED BY J. W. FULTON, 1850.

THE HISTORY OF THE
AMERICAN PEOPLE
FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME
BY J. W. FULTON
IN TWO VOLUMES
VOL. I
FROM THE FIRST SETTLEMENTS TO THE REVOLUTION
NEW YORK: PUBLISHED BY J. W. FULTON, 1850.

THE HISTORY OF THE
AMERICAN PEOPLE
FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME
BY J. W. FULTON
IN TWO VOLUMES
VOL. I
FROM THE FIRST SETTLEMENTS TO THE REVOLUTION
NEW YORK: PUBLISHED BY J. W. FULTON, 1850.

JOHN P. McCONNELL,
appellant

vs.

HARRY O. CHAMBERS, CAROLINE
McCONNELL, FIRST NATIONAL
BANK OF GALESBURG, ILLINOIS,
a Corporation, ARTHUR NELSON,
THOMAS POOLE,
appellees.

Appeal from the
Circuit Court of
Knox County, Illinois.

Jett, P. J.

Appellant filed a bill in the circuit court of Knox county, setting forth that on January 1, 1924, appellant and appellee, Harry O. Chambers, entered into a co-partnership for the wholesaling and retailing of grain and feed; that appellant and Chambers each contributed the sum of \$5,500 toward the capital invested at the time they entered into said co-partnership; that appellee, First National Bank, was the depository bank of said partnership, and that on July 3, 1926, profits had accrued in said business and were on deposit, amounting to about \$3,500; that in addition thereto a large amount of grain, feed and stock in trade had been paid for and was the property of said partnership; that appellant and Chambers "each drew from said business the sum of \$30 per week for his living expenses;" that, up to July 3, 1926, appellant and Chambers bought and sold merchandise and drew checks on said bank account; that on or about said date, appellee Chambers, Caroline McConnell, appellant's wife, and appellee bank "conspired to deprive" appellant of his rights in respect to said partnership funds and on said date said bank refused to honor a check drawn by appellant; "that on or about March 4, 1926, complainant gave to his wife a bill of sale of his interest in the said business; that said bill of sale was made and delivered to complainant's wife to preserve peace and quiet in his home; that there was no consideration therefor, and none

<p>Appelant from the Circuit Court of Knox County, Illinois</p>	<p>JOHN F. McCONNELL, appellant</p> <p>vs.</p> <p>HARRY O. CHAMBERS, CAROLINE McCONNELL, FIRST NATIONAL BANK OF GAITHERSBURG, a Corporation, ARTHUR NELSON, THOMAS POOLE, appellees.</p>
---	--

Let, P. 1.

Appellant filed a bill in the circuit court of Knox county, setting forth that on January 1, 1934, appellant and appellee Harry O. Chambers, entered into a co-partnership for the wholesaling and retailing of grain and feed; that appellant and Chambers each contributed the sum of \$2,500 toward the capital invested at the time they entered into said co-partnership; that appellee First National Bank, was the depository bank of said partnership, and that on July 3, 1936, profits had accrued in said business and were on deposit, amounting to about \$2,500; that in addition thereto a large amount of grain, feed and stock in trade had been paid for and was the property of said partnership; that appellant and Chambers "each drew first said business the sum of \$30 per week for his living expenses;" that, up to July 3, 1936, appellant and Chambers bought and sold merchandise and drew checks on said bank account; that on or about said date, appellee Chambers, Caroline McConnell, appellant's wife, and appellee bank "conspired to deprive" appellant of his rights in respect to said partnership funds and on said date said bank refused to honor a check drawn by appellant; "that on or about March 4, 1936, complainant gave to his wife a bill of sale of his interest in the said business; that said bill of sale was made and delivered to complainant's wife to preserve peace and quiet in his home; that there was no consideration therefor, and none

existed; that said Caroline McConnell never was given and never took or demanded possession of the said business; that the said bill of sale * * * should be held for naught; that on July 3, 1926, complainant was ousted from said business and all participation therein by said Harry O. Chambers, and has since been denied any right therein; that Harry O. Chambers and Caroline McConnell are squandering and exhausting the said partnership; that said Harry O. Chambers and the First National Bank have refused to make settlement with complainant; that since July 3, 1926, Caroline McConnell and Harry O. Chambers have taken possession of the said business and made large collections and refused complainant access to the books of account," etc.; praying that a receiver be appointed and that a restraining order be issued, enjoining appellee bank from paying out said partnership funds. Said bill also prayed for an accounting, and "that a writ of injunction issue, directed to Harry O. Chambers, Caroline McConnell, the First National Bank and Arthur Nelson, restraining them and each of them from collecting any of the debts due and owing said firm, and from using any of the co-partnership funds to his or her own use," etc.

A ppellee Chambers filed an answer, in which he admitted said partnership, but averred that in March 1926, appellant, with his (Chambers') consent "sold and transferred all of his interest in said partnership and all assets thereof, for a valuable consideration, to his wife, Caroline McConnell; that since said transfer, he (Chambers) and Caroline McConnell are operating said business, and that said business is not insolvent;" that the partnership between Chambers and appellant "was dissolved with full knowledge and consent of John P. McConnell; that the new firm came into possession of said business and assets, and have since conducted the same."

A n answer was filed by Caroline McConnell, in which she admitted the partnership between appellant and Chambers but averred that a part of the funds invested by her husband, belonged to her;

existed; that said Caroline McConnell never was river and never
 took or demanded possession of the said business; but the said
 bill of sale * * * should be held for naught; that on July 3,
 1923, complaint was made from said business and all parties
 joined therein by said Henry O. Chambers, and has since been
 denied any right therein; that Henry O. Chambers and Caroline Mc-
 Connell are acknowledging and admitting to all correspondence that
 said Henry O. Chambers and the First National Bank have refused to
 make settlement with complainant; that since July 3, 1923,
 Caroline McConnell and Henry O. Chambers have taken possession of
 the said business and made large collections and refused to
 disburse same to the books of account; that Henry O. Chambers
 receiver be appointed and that a restraining order be issued,
 enjoining appellees from taking any and all corporate funds.
 said bill also prayed for an accounting, and that a bill of
 injunction issue, directed to Henry O. Chambers, Caroline Mc-
 Connell, the First National Bank and Arthur Nelson, restraining
 them and each of them from collecting any of the debts due and
 owing said firm, and from taking any of the corporate funds
 to his or her own use, etc.
 A notice of motion filed on record, to show cause
 admitted said partnership, but averred that in March 1923, appellee
 with his (Chambers) consent took and received all of his
 interest in said partnership and all assets therefrom, and a valuable
 consideration, to his wife, Caroline McConnell; that since said
 transfer, he (Chambers) and Caroline McConnell have been operating said
 business, and that said evidence is not sufficient to set aside said
 sale between them; and admitted "was given to the said firm"
 lease and receipt of said business and assets, and that the same was
 the same."

" that John P. McConnell was guilty of the excessive use of intoxicating liquor, and says that he used partnership funds without accounting to his partner; that in the winter of 1926 she told him it would be impossible for her to live with him longer as his wife; that her husband told her he did not want to have any separation and that he did not want any dissolution of the partnership filed, and that he then admitted that she was part owner of the assets which had been put into the partnership business by him; that in the latter part of February 1926 complainant agreed with her that if she would not start any proceedings for a divorce or separate maintenance, and that if Harry O. Chambers would not start any proceedings to dissolve the partnership, and in consideration of the money which she had in said business, and that she would assume and pay the indebtedness for which John P. McConnell was liable in connection with the said business, he would transfer, assign and convey to her all of his interest of every kind and character," and that appellant did then and there "execute a bill of sale of all his interest in said partnership to her." She further avers that she and appellee Chambers took possession of the business and have conducted it since said time; that she had assumed said indebtedness for which John P. McConnell was liable; that appellant "was employed by said firm at \$30 per week so long as his services were satisfactory;" that on July 3, 1926, appellee Chambers informed appellant, with appellee Caroline McConnell's consent, that his services were no longer needed in said business; that on July 3, 1926, appellant came to said place of business and informed Chambers that he had sold his right, title and interest to one Thomas Pool, and demanded that Pool be let into possession of the one-half of said partnership and its business.

Appellee bank answered, setting forth that on July 3, 1926, there was a deposit to the credit of Chambers & McConnell of about \$3245.67; admitted that it had been directed by appellee Chambers not to honor any check drawn by appellant, and that it did so refuse to honor such checks.

" that John F. McDonnell was guilty of the excessive use of intoxicating liquor, and gave that he used partnership funds without accounting to his partner; that in the winter of 1928 she told him it would be impossible for her to live with him longer as his wife; that her husband told her he did not want to have any more action and that he did not want any dissolution of the partnership filed, and that he then admitted that she was part owner of the assets which had been put into the partnership business by him; that in the latter part of February 1928 complainant agreed with her that if she would not start any proceedings for a divorce or separate maintenance, and that if Harry C. Chambers would not start any proceedings to dissolve the partnership, and in consideration of the money which she had in said business, and that she would assume and pay the indebtedness for which John F. McDonnell was liable in connection with the said business, he would transfer, assign and convey to her all of his interest of every kind and character," and that appellant did then and there "execute a bill of sale of all his interest in said partnership to her." She further avers that she and appellee Chambers took possession of the business and have conducted it since said time; that she had assumed said indebtedness for which John F. McDonnell was liable; that appellant "was employed by said firm at \$80 per week so long as his services were satisfactory," which on July 3, 1928, appellee Chambers informed appellant, with appellee Thelma McDonnell's consent, that his services were no longer needed in said business; that on July 3, 1928, appellant came to said place of business and informed Chambers that he had said his right, title and interest to one Thomas Pool, and demanded that Pool be let into possession of the one-half of said partnership and its business.

Appellee Pool answered, setting forth that on July 3, 1928, there was a deposit to the credit of respondent McDonnell of about \$248.87; admitted that it had been directed by appellee Chambers not to honor any check drawn by appellant, and that it did so refuse to honor such checks.

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact. The master took and reported the evidence, and found the material facts substantially as set forth in the answers of appellees Chambers and Catherine McConnell, and recommended that said bill be dismissed for want of equity.

The grounds relied on by appellant for a reversal of said decree are substantially as follows: First, that Catherine McConnell had agreed with him that if he would transfer to her by bill of sale his interest in said partnership business, she would not file a bill for divorce, but would continue to live with him. Second, that there was no consideration for said transfer: Third, that said transfer was not executed, and could not be maintained as a gift.

The evidence discloses and the master found that appellant had been drinking; that his wife had threatened to leave him, and that she had, at the instance of appellant, agreed to live with him provided he would cease drinking; that appellant was employed by Mrs. McConnell and by appellee Chambers at a salary of \$30 per week, and that he worked for said wage until about the first of July, 1926; that some time in June, 1926, appellant had again begun drinking to excess and that Chambers, with the consent of Mrs. McConnell, had notified him that his services were no longer desired, on account of his drinking. So far as the evidence discloses, there is nothing to show that Mrs. McConnell's promise to continue to live with appellant if he would cease drinking, was not made in good faith.

It is only necessary to say that appellant's second contention, to the effect that there was no valid consideration for the execution of said bill of sale, is not well taken. It is conceded that the bill of sale set forth that Mrs. McConnell assumed and agreed to pay some \$1,450 of indebtedness, evidenced by notes signed by appellant and Mrs. McConnell. This constituted a sufficient consideration. *McFarlane v. Smith*, 107 Ill. 33-43. The mere fact that said transaction was between husband and wife does not change

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact. The master took and reported the evidence, and found the material facts substantially as set forth in the answers of appellants. Chambers and Catherine McConnell, and recommended that said bill be dismissed for want of equity.

The grounds relied on by appellant for a reversal of said decrees are substantially as follows: First, that Catherine McConnell had agreed with him that if he would transfer to her, by bill of sale his interest in said partnership business, and would not file a bill for divorce, but would continue to live with him. Second, that there was no consideration for said transfer. Third, that said transfer was not executed, and could not be sustained as a gift.

The evidence disclosed and the report would that appellant had been drinking; that his wife had threatened to leave him, and that she had, at the instance of appellant, agreed to live with him provided he would cease drinking; that appellant was employed by Mrs. McDonnell and by Justice Chambers at a salary of \$50 per week, and that he worked for said years until about the first of July, 1926; that some time in June, 1926, appellant had again begun drinking to excess and that Chambers, when in company of Mrs. McDonnell, had notified him that his services were no longer desired on account of his drinking. So far as the evidence disclosed, there is nothing to show that Mrs. McDonnell's promise to continue to live with appellant if he would cease drinking was not made in good faith. It is unnecessary to say that appellant's second or-

that said transaction was between Mary and her wife Jean and was consideration. "Estimate v. Smith, 100 Ill. 2d 505, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1

the rule, especially where the interests of third parties are not involved, the law being that husband and wife may contract with one another, and such contracts are enforceable. Hughes v. Noyes, 171 Ill. 575-583; Ayres Natl. Bank v. Barber, 287 Ill. 182-188; Luthy & Co. v. Paradis, 299 Ill. 380-386.

Appellant in his bill charges appellees with a conspiracy to defraud him of his rights in said partnership business. The evidence wholly fails to sustain said charge. The mere fact that the transaction involved was between a husband and wife raises no presumption of fraud. In Luthy & Co. v. Paradis, supra, the court at page 386 says:

"While the court will carefully scrutinize transactions between husband and wife, it cannot relieve the complainant of the burden of producing evidence tending to show that the transaction was fraudulent, or that the conveyance was void." Citing Sawyer v. Moyer, 109 Ill. 461-465.

In view of our holding on the first two propositions, it is not necessary for us to discuss the third. Appellant having failed to prove the allegations of his bill, the court did not err in dismissing the same for want of equity. The decree will therefore be affirmed.

Decree affirmed.

the rule, especially where the interests of third parties are not involved, the law being that husband and wife may contract with one another, and such contracts are enforceable. Hughes v. Hayes, 171 Ill. 575-578; Ayres Natl. Bank v. Barker, 287 Ill. 132-133;

Lutty & Co. v. Paradise, 293 Ill. 380-382.

Appellant in his bill charges appellee with a con-

spiracy to defraud him of his rights in said partnership business.

The evidence wholly fails to sustain said charge. The mere fact

that the transaction involved was between a husband and wife raises

no presumption of fraud. In Lutty & Co. v. Paradise, supra, the

court of page 382 says:

"While the court will carefully scrutinize transactions

between husband and wife, it cannot relieve the complainant of the

burden of producing evidence tending to show that the transaction

was fraudulent, or that the conveyance was void." Citing Sawyer

v. Sawyer, 108 Ill. 461-462.

In view of our holding on the first two propositions,

it is not necessary for us to discuss the third. Appellant having

failed to prove the allegations of his bill, the court did not

err in dismissing the same for want of equity. The decree will

therefore be affirmed.

Decree affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 634¹

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 25 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois
Second District

October Term, A. D. 1930.

The People of the State of
Illinois,

Defendant in Error,

Writ of Error to County Court,

vs.

McHenry County.

John Narowetz, Jr.,

Plaintiff in Error,

OPINION by BOGGS, J.

On July 2, 1929, one Pauline Frances Narowetz, a resident of Cary, McHenry County, was struck and killed by a train. She left surviving her plaintiff in error, her husband, and one Kenneth Arthur Narowetz, her son. At the time of her death, the said Kenneth Arthur Narowetz was about two months old.

Following the death of his wife, plaintiff in error, with said child, resided at the home of his mother in law, Mrs. Wium, until the latter part of May, 1930, when re removed to the home of his parents, in said village. At that time, he sought to take the child with him, but Mrs. Wium refused to allow him so to do. On June 3, 1930, Mary E. Wium filed a petition in the County Court of said county, setting forth among other things that she was a reputable and responsible resident of said county; that Kenneth Arthur Narowetz was a male child under the age of seventeen years, and not an inmate of a State institution incorporated under the laws of the State, and is a dependent child, in this, that the said child had not proper parental care and guardianship"; that plaintiff in error, "the father of said child, has wholly neglected, failed and refused and does neglect, fail and refuse to properly care for said child; that he is unfit and an improper guardian and is wholly

In the Appellate Court of Illinois

Second District

October Term, A. D. 1930.

The People of the State of
Illinois,

Defendant in Error,
vs.
Writ of Error to County Court,
McHenry County.

John Narowetz, Jr.,
Plaintiff in Error,

OPINION BY BOGGS, J.

On July 8, 1929, one Pauline Frances Narowetz, a resident of Cary, McHenry County, was struck and killed by a train. She left surviving her plaintiff in error, her husband, and one Kenneth Arthur Narowetz, her son. At the time of her death, the said Kenneth Arthur Narowetz was about two months old.

Following the death of his wife, plaintiff in error, with said child, resided at the home of his mother in law, Mrs. Wilm, until the latter part of May, 1930, when he removed to the home of his parents, in said village. At that time, he sought to take the child with him, but Mrs. Wilm refused to allow him to do so.

On June 8, 1930, Mary E. Wilm filed a petition in the County Court of said county, setting forth among other things that she was a reputable and responsible resident of said county; that Kenneth Arthur Narowetz was a male child under the age of seventeen years, and not an inmate of a State institution incorporated under the laws of the State, and is a dependent child, in this, that the said child had not proper parental care and guardianship; that plaintiff in error, "the father of said child, has wholly neglected, failed and refused and does neglect, fail and refuse to properly care for said

unwilling to care for and discipline said child"; that plaintiff in error "is addicted to the use of alcoholic liquors and for the space of one year * * * had been an habitual drunkard; that petitioner, as grandmother of said child, is able to contribute toward the support of said child."

Said petition prayed "that the court appoint some proper and suitable person guardian of the person of said child, and authorize such guardian to assent to the legal adoption of said child", etc.

At the request of the County Judge of said county, the Honorable P. L. Persons, County Judge of Lake County, presided at said hearing. A trial was had, resulting in a verdict finding "that Kenneth Arthur Narowetz is a dependent child." Judgment was rendered on said verdict and an order was entered "that the custody of said dependent be awarded to Mary E. Wium, the maternal grandmother, as guardian, and that the father of said dependent pay the said guardian, on each Saturday thereafter, on account of the care of said child, the sum of \$5.00, or until further order of court." To reverse said judgment, this writ of error is prosecuted.

While numerous errors were assigned on the record, the principal ground urged for a reversal of said judgment is that the verdict and judgment is against the manifest weight of the evidence.

Mrs. Wium testified that her family consisted of her husband, a son and herself; that she had a daughter who was married and was not living at home; that plaintiff in error was a sheet metal worker "and came home every night when he was not working"; that "he moved to his mother's and wanted to take the baby away from me. * * * I * * * said he could not take him, and he said he was going to take the baby to his mother's, and I held to the baby."

This witness further testified, on cross examination: "Mr. Narowetz, the father, up until the time he wanted to take the baby, was living with me. * * * Mr. Narowetz gave me \$15 a week for his board, room and lodging, and keeping the baby. * * * When I told him he could not take the baby he did not strike me or use any violence

unwilling to care for and discipline said child"; that plaintiff in error "is addicted to the use of alcoholic liquors and for the space of one year * * * had been an habitual drunkard; that petitioner, as grandmother of said child, is able to contribute toward the support of said child."

Said petition prayed "that the court appoint some proper and suitable person guardian of the person of said child, and authorizing such guardian to assent to the legal adoption of said child," etc.

At the request of the County Judge of said county, the Honorable F. L. Persons, County Judge of Lake County, presided at said hearing. A trial was had, resulting in a verdict finding "that Kenneth Arthur Nawotetz is a dependent child." Judgment was rendered on said verdict and an order was entered "that the custody of said dependent be awarded to Mary L. Wilson, the maternal grandmother, as guardian, and that the father of said dependent pay the said guardian, on each Saturday thereafter, on account of the care of said child, the sum of \$3.00, or until further order of court." To reverse said judgment, this writ of error is prosecuted.

While numerous errors were assigned on the record, the principal ground urged for a reversal of said judgment is that the verdict and judgment is against the manifest weight of the evidence.

Mrs. Wilson testified that her family consisted of her husband, a son and herself; that she had a daughter who was married and was not living at home; that plaintiff in error was a sheet metal worker and came home every night when he was not working; that he moved to his mother's and wanted to take the baby away from her. I * * * said he could not take him, and he said he was going to take the baby to his mother's, and I held to the baby."

This witness further testified, on cross examination: "Mr. Nawotetz, the father, up until the time he wanted to take the baby, was living with me. * * * Mr. Nawotetz gave me 15 a week for his board, room and lodging, and keeping the baby. * * * When I told him he could not take the baby he did not strike me or use any violence

with me at all, but he argued with me quite awhile. He came back the next day and asked for the baby again. He kept coming back until the papers were issued in this matter."

Plaintiff in error was called as a witness by the petitioner and testified that he "boarded with the Wioms from the 2nd of July last year until the last Saturday of May." He further testified that he was a sheet metal worker, belonged to a union and earned \$1.00 an hour; that he paid his mother \$15 a week for his board. He further testified: "I have a home. It is with my parents, my father's house, and I have made arrangements to live there. None of my brothers and sisters are living at home. My mother is going to take care of the baby. She is able-bodied and if she needs help I will hire a girl. My mother sews and mends. My mother gets up at 5:30. I leave for work and do not know what time she finishes her work. I work and am capable for providing for this baby." On cross examination he testified: "I am employed by the Narowetz Heating & Ventilating Co. It is owned by my uncle, he is the president and my cousin is the secretary."

One Carl Krenz testified on behalf of the petitioner that he knew plaintiff in error; that he "saw him last New Year's night at St. Patricks's. It is a summer resort, a place where you eat, etc., soft drinks. There was no special party there. There were about 25 people there. I saw John Narowetz that night. I did not see John Narowetz drink. I have seen him drink. I do not know what effect drink would have on him. I have never seen him really drunk."

Plaintiff in error's mother was called as a witness by petitioner, and testified that she was 59 years old; that she had reared eleven children; that she had no help or assistance, and did not need any; that her family consisted of her "husband, myself and John. All the rest of the children are married. My husband works nights. John Narowetz, Jr., gets up at 5:30 every morning. * * * John has a home now, he is with his father and me and that is just the same as his home."

with me at all, but he argued with me quite awhile. He came back the next day and asked for the baby again. He kept coming back until the papers were issued in this matter."

Identified in error was called as a witness by the

petitioner and testified that he "has lived with the family from the end of July last year until the last Saturday of May." He further testified that he was a sheet metal worker, belonged to a union and earned \$1.00 an hour; that he paid his mother \$18 a week for his board. He further testified: "I have a home. It is with my parents, my father's home, and I have the arrangements to live there. None of my brothers and sisters are living at home. My mother is going to take care of the baby. She is sole-bodied and it she needs help, will hire a girl. My mother goes and sends. My mother goes up at 8:30. I leave for work and do not know what time she finished her work. I work and am capable for providing for this baby." On cross examination he testified: "I am employed by the Garretts Heating & Ventilating Co. It is owned by my uncle, he is the president and my uncle is the secretary."

One Carl Nixon testified on behalf of the petitioner

that he knew plaintiff in error; that he "saw him last New Year's night at St. Patrick's. It is a summer resort, a place where you eat, etc., soft drinks. There was no special party there. There were about 25 people there. I saw John somewhere that night. I did not see John anywhere else. I have seen him there. I do not know what effect drink would have on him. I have never seen him really drunk."

Identified in error's mother was called as a witness by

petitioner, and testified that she was 50 years old; that she had reared eleven children; that she had no help or assistance, and did not need any; that her family consisted of her husband, two sons and two daughters. All the rest of the children are married. It appeared from a list of John's names, Mr. "gets up at 8:30 every morning." "I saw him last home now, he is with his father and me and that is that the same as his home."

Petitioner's daughter, Camille Johnson, testified: "I am acquainted with John Narowetz, Jr., and know him fairly well. I know what time he would come home when I was staying with my mother. Only one occasion do I know what condition he was in when he came home. ^{was} I usually in bed when he came home."

Plaintiff in error, testified in his own behalf that "in the course of my employment * * * I work on scaffolds. Where I am working now it is 82 feet high. There is no scaffold. It is the 124th Infantry armory on 52nd and Cottage Grove avenue. I worked on Clark and Monroe street on a 24- story building. I pounded every rivet on that Monroe and Clark job. About two years ago I worked on the First National Bank Building on Clark, Monroe and Dearborn streets; on the State Bank Building; on the Chicago Title & Trust building; on the Northern Trust Building; on the Chicago & Northwestern depot. On the Clark and Monroe street job, the only floor below me was the basement; you couldn't see it. I leave at 6:02 in the mornings and I am at work at 8 o'clock every morning. During the past five years I have not lost twenty days. * * * While I lived with my mother in law every Saturday I paid her for the care of the child. When I told her I wanted to take the baby away she told me I could not do it, if it cost her a million dollars she was going to keep the baby. I offered her no violence when she refused. I asked her in a nice way, told her I was going to take the baby away, and she told me I could not do it."

Louis Narowetz testified that he was the owner of the Narowetz Heating and Ventilating Company; that plaintiff in error had worked for him for the past five years, practically every day; that "he has worked steadily the last four years. This year, of course business is slack and he has lost a few days during this year. The reason was, there was no work."

The foregoing is in substance the testimony in said cause.

Section 7 of chapter 23, par. 325, Cahill's Statutes, provides, among other things: "If the court shall find any male child

Testimony's daughter, Cecilia Johnson, testified "I

was acquainted with John Watson, Jr., and know him fairly well. I

know that time he would come home when I was staying with my mother.

Only one occasion do I know that contact with him was in when he came home.

I usually in bed when he came home.

Plaintiff in error, testified in his own behalf that

"in the course of my employment I was working on scaffolds. There I

am working now it is 82 feet high. There is no scaffold. It is the

184th Infantry armory on 32nd and Cottage Grove Avenue. I worked on

Clark and Monroe street on a 24-story building. I worked every

night on that Monroe and Clark job. About two years ago I worked on

the First National Bank Building on Clark, corner of Dearborn Street;

on the State Bank Building; on the Chicago Title Trust Building; on

the Northern Trust Building; on the Chicago Western Trust Building.

On the Clark and Monroe street job, the only floor below me was the

basement; you couldn't see it. I leave at 3:00 in the morning and I

am at work at 6:00 clock every morning. I work the last five years I

have not lost twenty days. While I lived with my mother in law

every Saturday I paid her for the care of the child. When I could her

I wanted to take the baby away and I could not do it. It is

cost her a million dollars and was going to keep the baby. I wanted

her no violence then she refused. I asked her to give me, told her

I was going to take the baby away. She said I could not do it. It is

John Watson testified that he was a partner in the firm of

Narrows Watson and Ventilating Company, Inc., located in Chicago and

worked for him for the past five years, principally on the job that

he now worked at the 1st at Four years. This job was on the

business is slack and he has lost a few weeks during the last

season was, there was no work.

The Chicago Title Trust Building is in Chicago and is located in the

section V of chapter 22, Part 1, Illinois Compiled Statutes.

provides, among other things: "In the event of a fire, the owner of the

under the age of seventeen years or any female child under the age of eighteen years to be dependent or neglected, * * * or if the court shall further find that the parent, parents, guardian or custodian of such child are unfit or improper guardians, or are unable or unwilling to care for, protect, educate, train or discipline such child, and that it is for the best interests of such child and the people of this State that such child be taken from the custody of its parents, custodian or guardian, the court may make an order appointing as guardian of the person of such child, some reputable citizen of good moral character, * * * or the court may enter an order committing such child to some suitable State institution." etc.

Under the provisions of the foregoing statute, before the court is authorized to enter an order depriving a parent of his or her child, there must first be a finding that such parent is an unfit person to have such custody. *Sullivan v. People*, 224 Ill. 468-477; *Carmack v. Marshall*, 211 Ill. 519-523; *Hohenadel v. Steele*, 237 Ill. 229-234; *Stafford v. Stafford*, 299 Ill. 438-443; *People v. Hoxie*, 175 App. 566; *Harmon v. Starbody*, 219 App. 603-605.

The parent's right to the custody of his child is superior to the right of any other person, if he is a fit person to have such custody and is so circumstanced that he can provide the necessities of life and properly provide, maintain and educate the child. *Cahill's Stat.*, chap. 64, sec. 4; *Sullivan v. People*, *supra*, 476; *Carmack v. Marshall*, *supra*, 527; *Hohenadel v. Steele*, *supra*, 234; *Stafford v. Stafford*, *supra*, 449; *People, ex rel, Hirsch v. Nagel*, 243 App. 490-496; *People v. Hoxie*, *supra*.

The burden of proving that plaintiff in error was an unfit person to have the care and custody of his child was on the petitioner. In the absence of such proof, fitness will be presumed. *Sullivan v. People*, *supra*, 477; *Stafford v. Stafford*, *supra*, 449; *Wohlford v. Burckhardt*, 141 Ill. 321-325; *People v. Hoxie*, *supra*, 567.

Under the foregoing authorities, the burden of establishing

Under the age of seventeen years or any female child under the age of eighteen years to be dependent or neglected; * * * or if the court shall further find that the parent, parents, guardian or custodian of such child are unfit or improper guardians, or are unable or unwilling to care for, protect, educate, train or discipline such child, and that it is for the best interests of such child and the people of this state that such child be taken from the custody of its parents, custodian or guardian, the court may make an order appointing as guardian of the person of such child, some responsible citizen of good moral character, * * * or the court may enter an order committing such child to some suitable state institution." etc.

Under the provisions of the foreign statute, before the court is authorized to enter an order depriving a parent of his or her child, there must first be a finding that such parent is an unfit person to have such custody. *William v. Scott*, 224 Ill. App. 400-407; *Barack v. Marshall*, 111 Ill. 310-323; *Wendel v. Todd*, 237 Ill. 233-234; *Stefford v. Stefford*, 298 Ill. 433-441; *Scott v. Scott*, 175 App. 566; *Hannon v. Hannon*, 219 App. 602-603.

The parent's right to the custody of his child is superior to the right of any other person, and he is entitled to have such custody and is so entitled unless he can provide the necessities of life and properly protect, maintain and educate the child. *Smith's Stat.*, Chap. 44, Sec. 4; *William v. Scott*, 224 Ill. App. 400-407; *Barack v. Marshall*, 111 Ill. 310-323; *Wendel v. Todd*, 237 Ill. 233-234; *Stefford v. Stefford*, 298 Ill. 433-441; *Scott v. Scott*, 175 App. 566; *Hannon v. Hannon*, 219 App. 602-603.

The burden of proving that a parent is an unfit person to have the custody of his child is on the petitioner. In the absence of such proof, the court is not authorized to deprive a parent of his child. *William v. Scott*, 224 Ill. App. 400-407; *Barack v. Marshall*, 111 Ill. 310-323; *Wendel v. Todd*, 237 Ill. 233-234; *Stefford v. Stefford*, 298 Ill. 433-441; *Scott v. Scott*, 175 App. 566; *Hannon v. Hannon*, 219 App. 602-603.

the unfitness of plaintiff in error was on the petitioner. The evidence not only fails to sustain such charge but is to the effect that plaintiff in error is a fit person to have the care and custody of his child. The evidence also fails to sustain the charge of abandonment. Petitioner herself testified that plaintiff in error was seeking the custody of his child, and while in her home he had paid the petitioner \$15 per week for his board and for the care of said child. The proof also fails to sustain the charge that plaintiff in error was an habitual drunkard. *Stafford v. Stafford*, supra, 448.

The evidence so palpably fails to sustain the averments of the petition, or to show the unfitness of plaintiff in error, that it is not necessary to further discuss the same. For the reasons above set forth, the judgment of the trial court, finding that plaintiff in error is an unfit person to have the care and custody of his child, and appointing the petitioner as its guardian, is reversed.

We find as an ultimate fact, to be made a part of the judgment in this case, that, taking the evidence in its most favorable aspect toward the contentions of defendant in error, it does not fairly tend to prove the unfitness of plaintiff in error to have the care, custody and control of his child, or that said child was a dependent or neglected child.

Judgment reversed, with finding of fact.

the unfitness of plaintiff in error was of the petitioner. The evidence not only fails to sustain such charge but is to the effect that plaintiff in error is a fit person to have the care and custody of his child. The evidence also fails to sustain the charge of abandonment. Petitioner herself testified that plaintiff in error was seeking the custody of his child, and while in her home he had paid the petitioner \$15 per week for his board and for the care of said child. The proof also fails to sustain the charge that plaintiff in error was an habitual drunkard. Stafford v. Stafford, supra, and the evidence so palpably fails to sustain the charge of the petition, or to show the unfitness of plaintiff in error, that it is not necessary to further discuss the case. For the reasons above set forth, the judgment of the trial court, finding that plaintiff in error is an unfit person to have the care and custody of his child, and appointing the petitioner as its guardian, is reversed. We find as an alternative fact, to be made a part of the judgment in this case, that, taking the evidence in its most favorable aspect toward the contention of petitioner in error, it does not fairly tend to prove the unfitness of plaintiff in error to have the care, custody and control of his child, or that said child was dependent or neglected child.

Judge of the Court, the finding of fact.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

115 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

200 I.A. 634²

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 25 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

C. R. DOWNING,
appellee

vs.

ROCKFORD CAB AND
DRIVEYOURSELF CO.,
appellant

Appeal from Circuit
Court of Winnebago
County.

Boggs, J.

Fifth Avenue in the City of Rockford runs in an easterly and westerly direction and intersects at right angles with Ninth Street, which runs in a northerly and southerly direction. On the morning of March 28, 1930, appellee was driving an automobile in a westerly direction on Fifth Avenue, approaching said intersection. A taxicab owned by appellant and driven by one George Munson, was proceeding south on Ninth Street. A collision occurred in said intersection, resulting in damages to appellee's car, to recover for which suit was instituted before a justice of the peace in Winnebago County. Appellant defaulted. Judgment being rendered against it, an appeal was taken to the circuit court, where a trial was had, resulting in a verdict and judgment in favor of appellee for \$250. To reverse said judgment, this appeal is prosecuted.

The abstract filed by appellant does not contain the verdict, the judgment, or the motion for a new trial. Rule 16 of the rules of practice of this court provides, among other things:

"The abstract shall contain in a concise form so much as may be necessary or important of the pleadings, the interlocutory orders and the judgment or decree. * * * It must fully present every exception relied on."

We would be warranted in affirming this judgment for the failure of appellant to file a proper abstract. *Gibler v. City of Mattoon*, 167 Ill. 18; *People v. Yuskas*, 268 Ill. 328; *Jackson v. Winans*, 287 Ill. 382; *Bedinger v. May*, 323 Ill. 187-192; *Deterding v. Central I. P. S. Co.*, 223 App. 374-375. We have deemed best, how-

ever, to consider the case on the merits.

It is first contended by appellant that appellee was guilty of negligence, which contributed to the occurrence of said collision, and that by reason thereof he is not entitled to recover. It is insisted by appellant that, as its cab was approaching from the right, it had the right of way, and that appellee negligently drove into said intersection, causing said collision. On the other hand, counsel for appellee, while conceding said rule with reference to the right of way, insists that said collision was occasioned by the driver of appellant's taxicab operating the same at a high and dangerous rate of speed through a built-up residential district of said city.

Appellee testified: "When I first saw the other car, I was about eight feet west of the east curbing of Ninth street. I then put on my brakes. It was a clear morning. Before entering the intersection, I looked to the right when I was about 20 or 25 feet east of the curb. * * * After I looked north, I looked south."

On cross examination, appellee was asked: "Did you again look north before or after you went into the intersection, before you saw this car?" He answered: "No. As I entered Ninth street I just see out of the side of my eye, saw them coming. They were right on top of me when I entered Ninth Street. I was going around 15 or 20 miles an hour. I believe we struck the left front wheel of the taxicab. When I first saw the taxicab, it was on my right side." Appellee further testified that Munson, the driver of appellant's car "told me that he knew his brakes were no good."

Mrs.

A/Mary Swanson testified that she lived three doors north of the intersection of Ninth street and Fifth avenue; that she was on the porch on the morning of the accident; that she "saw the taxicab just before the accident. * * * I judge it to be going about 50 miles an hour. * * * The driver of the car of the defendant company came to my house. * * * He said he couldn't stop because his brakes weren't working."

A Mrs. Carlstrom testified that she was at the home of

ever, to consider the case on the merits.

It is first contended by appellant that appellee was guilty of negligence, which contributed to the occurrence of said collision and that by reason thereof he is not entitled to recover. It is insisted by appellant that, as the cab was approaching from the right, it had the right of way, and that appellee negligently drove into said intersection, causing said collision. On the other hand, counsel for appellee, while opposing said rule with reference to the right of way, insists that said collision was occasioned by the driver of appellant's taxicab operating the same at a high and dangerous rate of speed through a built-up residential district of said city.

Appellee testified: "When I first saw the other car, I was about eight feet west of the east curbing of Ninth street. I then put on my brakes. It was a clear morning. Before entering the intersection, I looked to the right when I was about 20 or 25 feet east of the curb. * * * After I looked north, I looked south." On cross examination, appellee was asked: "Did you again look north before or after you went into the intersection, before you saw this car?" He answered: "No. As I entered Ninth street I just see out of the side of my eye, saw them coming. They were right on top of me when I entered Ninth street. I was going around 15 or 20 miles an hour. I believe we struck the left front wheel of the taxicab. When I first saw the taxicab, it was on my right side." Appellee further testified that he saw the driver of appellant's car "told me that he knew his brakes were no good." Mrs. Mary Swanson testified that she lived three doors north of the intersection of Ninth street and Fifth avenue; that she was on the porch on the morning of the accident; that she "saw the taxicab just before the accident. * * * I judge it was about 50 miles an hour. * * * The driver of the car at the telephone any came to my house. * * * He said he couldn't stop because his brakes weren't working." A Mrs. Garlstrom testified that she was at the time of

Mrs. Swanson on the day of the accident, and that she "saw the taxicab before the collision. It was traveling south of Mrs. Swanson's house. We were on the porch at the time. * * * When this taxicab was going past Mrs. Swanson's house, it was going not less than fifty miles an hour."

Charles Bouds testified on behalf of appellee that he noticed a skid mark on Ninth street, and that it ended "right on Fifth avenue. * * * It measured 97 feet and 6 inches from where it began, and it ended in the intersection."

Munson testified on behalf of appellant that when he saw about eighty feet north of the north curb of Ninth street he saw appellee's car, and that it was then about 120 feet east of the east curb of Ninth street; that "I threw in my clutch and put on my brakes and blew my horn. I blew my horn all the way to the intersection, and I seen he was going to hit me and I turned to the west and tried to avoid hitting him. The driver of the other car was looking south and his front wheels was over the sidewalk of the intersection when he seen me, and then he put on his brakes, and the imprints on the pavement show that the brakes on his rear wheels hadn't taken hold until they were over the sidewalk, and I judge about ten feet from me, from my car. The skid marks of my car were about 60 feet. The condition of my brakes was very good. All four brakes were taking, but the road was soft, it was a hot day, and on top of this tarvia it was just like grease. He further testified: "When I first saw the other car I was traveling not over 25 miles an hour."

A Mr. Hansen testified on behalf of appellant that when he first saw appellee's car it was about ten or fifteen feet east of the curbing of Ninth street; that it "was traveling about fifteen and twenty miles per hour. * * * The Downing car slowed down a little bit, about three or four miles per hour about six feet east of the curb."

William Schiltz, a mechanic, testified that he had gone over the brakes on appellant's car the day before the accident.

Mrs. Swanson on the day of the accident, and that she saw the
taxicab before the collision. It was traveling south of Mrs.
Swanson's house. He was on the porch at the time. * * * When
this taxicab was going past Mrs. Swanson's house, it was going not
less than fifty miles an hour."

Charles Hounds testified on behalf of appellee that he
noticed a skid mark on Ninth Street, and that it ended "right
on Fifth Avenue. * * * It measured 27 feet and 2 inches from where
it began, and it ended in the intersection."

Manson testified on behalf of appellee that when he saw
about eighty feet north of the north curb of Fifth Street he saw
appellee's car, and that it was then about 120 feet east of the
east curb of Ninth Street; that "I threw in a clutch and put on
my brakes and blew my horn. I blew my horn all the way to the
intersection, and I seen he was going to hit me and I turned to
the west and tried to avoid hitting him. The driver of the other
car was looking south and his front wheels was over the sidewalk
of the intersection when he seen me, and then he got on his brakes,
and the front of the car went about that the brakes on the rear
wheels hadn't taken hold until they were over the sidewalk, and
I judge about ten feet from me, from my car. The skid marks
of my car were about 20 feet. The condition of my brakes was very
good. All four brakes were working, but the road was soft, it was
a hot day, and on top of this traffic is the fact that it was
He further testified: "When I first saw the other car I was travel-
ing not over 25 miles an hour."

A Mr. Hounds testified on behalf of appellee that when
he first saw appellee's car it was about ten or fifteen feet east
of the curb of Ninth Street, that it was traveling south of Fifth
Street and twenty miles per hour. * * * The car was about four
feet east of the curb."

William Schmitt, a mechanic, testified that he had gone
over the brakes on appellee's car the day before the accident.

He further testified that after the collision the front wheels of appellee's car were bent in and the front fender and bumper torn off.

A. I. Koch, the manager of appellant company, testified that he and another party stepped off the skid marks made by appellant's car, and that they ran back between sixty and seventy feet.

In view of the foregoing testimony, we would not be warranted in reversing said judgment on the ground that appellee was guilty of contributory negligence.

It is next insisted that, even though appellee is entitled to recover, there is no sufficient proof as to his damages.

Appellee testified that the fair cash market value of his automobile was \$250; that he had an estimate of what it would cost to repair the same, and that the estimate was \$267.75. He further testified that he took off all four of the tires and sold the automobile for \$1.00; that he sold one of the tires for ~~\$5.00~~ \$5.00 and that the other three were worth about \$12.00.

Appellant insists that the evidence fails to show the qualification of appellee. Appellee testified, without objection, that he was familiar with the fair and customary value of second hand automobiles at the time of the collision. The contention that appellee was not qualified is not well taken. *Hey v. Hawkins*, 123 App. 483-485; *McDowell v. Lake Erie & W. R. Co.*, 208 App. 442-461; *Pike v. City of Chicago*, 155 Ill. 656-663.

It is also contended by appellant in this connection that the burden was on appellee to show that the measure of damages adopted by appellee was the one most favorable to appellant. This point is not well taken, the law being to the contrary. *McDonnell v. Lake Erie & W. R. Co.*, *supra*, 461; *Mowery v. City of Mounds*, 245 App. 338-345. In the latter case, the court at page 345 says:

"The law is that the measure of damages that should be adopted in a case of this character is the one that will be most favorable to the party liable therefor. However, we are of the opinion and hold that if the person whose property is damaged

He further testified that after the collision the front wheels of appellee's car were bent in and the front fender and bumper torn off.

A. I. Koch, the manager of appellant company, testified that he and another party stepped off the skids marks made by appellee's car, and that they ran back between sixty and seventy feet.

In view of the foregoing testimony, we would not be warranted in reversing said judgment on the ground that appellee was guilty of contributory negligence.

It is next insisted that, even though appellee is entitled to recover, there is no sufficient proof as to his damages.

Appellee testified that the fair cash market value of his automobile was \$250; that he had an estimate of what it would cost to repair the same, and that the estimate was \$317.75. He further testified that he took off all four of the tires and sold the automobile for \$1.00; that he sold one of the tires for \$5.00 and that the other three were worth about \$1.00.

Appellant insists that the evidence fails to show the qualification of appellee. Appellee testified, without objection, that he was familiar with the fair and customary value of second hand automobiles at the time of the collision. The contention that appellee was not qualified is not well taken. See v. Hawkins, 183 App. 483-485; 189 Ill. App. 448-451; 189 Ill. App. 448-451; Pike v. City of Chicago, 185 Ill. 67-69.

It is also contended by appellant that in the connection that the burden was on appellee to show that the measure of damages adopted by appellee was the one most favorable to appellant. This point is not well taken, the law being to the contrary. McDonald v. Lake Erie & W. R. Co., 189 Ill. App. 448-451; 189 Ill. App. 448-451. In the latter case the court said: "The law is that the measure of damages is the one that will be most favorable to the party liable therefor. However, where the measure of damages is the one that will be most favorable to the party whose property is damaged and held that if the person whose property is damaged

offers proof without objection, on the theory that the measure of damages is the difference between the value of the article before and after the injury, that if the person liable therefor insists that the damages should be the cost of repair, taken together with the difference, if any, in the value of the article after repair and before injury, he should offer evidence in support of that theory so that the jury may have such evidence before them to act upon in fixing the damages. This appellant has failed to do. It is therefore not in a position to complain as to the measure of damages adopted by the court and jury."

One witness for appellant testified that in his opinion appellee's automobile before the injury was worth \$100. Appellant, having offered the same character of proof, is therefore in no position to complain.

Other errors were assigned on the record but were not argued, and are therefore taken as waived.

The verdict of the jury on the issue as to the due care of appellee and the negligence of appellant is supported by the evidence. There being no substantial error in the rulings of the court, the judgment should be affirmed.

Judgment affirmed.

offers proof without objection, on the theory that the measure of damages is the difference between the value of the article before and after the injury, that if the person liable therefor insists that the damages should be the cost of repair, when together with the difference, if any, in the value of the article after repair and before injury, he should offer evidence in support of that theory so that the jury may have such evidence before them to act upon in fixing the damages. This appellant has failed to do. It is therefore not in a position to complain as to the measure of damages adopted by the court and jury."

One witness for appellant testified that in his opinion appellee's automobile before the injury was worth \$100. Appellant, having offered the same character of proof, is therefore in no position to complain.

Other errors were assigned on the record but were not

argued, and are therefore taken as waived.

The verdict of the jury on the issue as to the care of appellee and the negligence of appellant is supported by the evidence. There being no substantial error in the finding of the

court, the judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

116
AT A TERM OF THE APPELLATE COURT,

7
Begun and held at Ottawa, on Tuesday, the Third day of February, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 - 1. 634³

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 25 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Yes.

Appellee

Appeal from the Circuit
Court of Livingston County.

Minnie A. McMullen, plaintiff, brought suit against Sam Fotna, defendant, to recover \$2,000 paid by her under a contract for the purchase of certain real estate, together with interest on said sum. The contract was dated September 16, 1919, and provided that defendant should on or before September 20, 1919, furnish an abstract showing a good merchantable title to the premises. The balance of the purchase money was to be paid and possession was to be delivered on or before March 1, 1920. Each party claims the other was in default under the contract.

The suit was brought to the October term, 1929. At the January term, 1930, the cause was set for trial on the 20th of that month at one-thirty o'clock p.m. It was not reached on that day and on January 22nd, plaintiff served notice on defendant that she would apply for a continuance of the cause, and filed a motion verified by her attorney, praying a continuance of thirty days. The grounds set forth in the motion are, that prior to January 11, 1930, the said attorney instructed plaintiff to interview certain persons in Livingston County, who were claimed to be able to give testimony necessary to the proper presentation of her case; that she afterward advised her said attorney that she had been unable to call upon such witnesses, owing to the bad condition of the roads, severe cold weather, and her own illness; that the attorney maintained his place of business in the City of Chicago; that on January 13, 1930, he was informed by his representative in Pontiac, Illinois,

MINNIE A. McMULLEN, Appellant	}	Appeal from the Circuit Court of Livingston County.
as SAM TOLNA, Appellee	}	

Jones; J.

Minnie A. McMullen, Plaintiff, brought suit against Sam Tolna, defendant, to recover \$3,000 paid by her under a contract for the purchase of certain real estate, together with interest on said sum. The contract was dated September 18, 1918, and provided that defendant should on or before September 30, 1919, furnish an abstract showing a good merchantable title to the premises. The balance of the purchase money was to be paid and possession was to be delivered on or before March 1, 1920. Each party claims the other was in default under the contract. The suit was brought to the October term, 1920. At the January term, 1920, the cause was set for trial on the 20th of that month at one-thirty o'clock p.m. It was not reached on that day and on January 22nd, Plaintiff served notice on defendant that she would apply for a continuance of the cause, and filed a motion verified by her attorney, praying a continuance of thirty days. The grounds set forth in the motion are, that prior to January 11, 1920, the said attorney instructed Plaintiff to interview certain persons in Livingston County, who were claimed to be able to give testimony necessary to the proper presentation of her case; that she afterward advised her said attorney that she had been unable to call upon such witnesses, owing to the bad condition of the roads, severe cold weather, and her own illness; that the attorney maintained his place of business in the City of Chicago; that on January 13, 1920, he was informed by his representative in Pontiac, Illinois,

that jury trials would begin in the Livingston County Circuit Court on January 20th; that petitioner was unfamiliar with the length of time it would take to reach cases for trial in that court and assumed that because trials were to commence on January 20th, he would have at least several weeks thereafter to locate and see the witnesses referred to, and on that account, he did not request plaintiff to immediately complete her investigation. The names of the witnesses to the interview and the matters to which they would testify were set out in the petition. On January 23rd the motion for a continuance was overruled and, when the cause was reached for trial on that day, plaintiff failed to appear. The court thereupon dismissed the suit for want of prosecution.

On March 20th, 1930, plaintiff filed a petition to vacate the order dismissing the suit and to reset the cause for hearing. The petition was supported by plaintiff's affidavit that at the time the cause was dismissed for want of prosecution she was unable to locate said witnesses on account of bad roads, cold weather, and her own illness. The affidavit stated that two named witnesses were able to testify to certain specified facts, and that affiant knew of no other witness able to testify to such facts. It also stated that it would have been useless to issue subpoenas prior to January 23rd, because affiant did not then know, after due inquiry, where the witnesses could be found. On May 7, 1930, one of the days of the May term, 1930, the court denied the petition to set aside the former order and this appeal was taken.

No bill of exceptions, stenographic report, or certificate of evidence was presented or signed during the January term, or within any time granted at that term for that purpose. The only bill of exceptions in the record was taken and signed at the May term. The original bill of exceptions did not contain either of the motions, the affidavits in support thereof, or the rulings of the court. They appeared only in the record. On October 9th,

that jury trial would begin in the District Court about
January 30th; that petitioner was familiar with the
length of time it would take to reach cases for trial in that
court and assumed that because trials were to commence in
January 30th, he would have at least several weeks thereafter
to locate and see the witnesses referred to, and on that account
he did not request plaintiff to immediately produce her witnesses.
The names of the witnesses to the interview and the mat-
ters to which they would testify were set out in the petition.
On January 23rd the motion for a continuance was overruled and,
when the case was reached for trial on that day, plaintiff failed
to appear. The court thereupon dismissed the writ for want of
prosecution.

On March 20th, 1930, plaintiff filed a petition to
vacate the order dismissing the writ and to reset the case for
hearing. The petition was supported by plaintiff's affidavit
that at the time the case was dismissed for want of prosecution
she was unable to locate said witnesses because of a severe
cold weather, and her two children. The affidavit stated that
two named witnesses were able to testify to certain specified
facts, and that plaintiff knew of no other witnesses able to testify
to such facts. It also stated that it would have been impossible
to issue subpoenas prior to January 23rd, because plaintiff did not
then know, after due inquiry, where the witnesses could be found.
On May 7, 1930, one of the days of the May term, 1930, the court
denied the petition to set aside the former order and this appeal
was taken.

No bill of exceptions, statements or evidence were
of evidence was presented or taken during the January term, and
plaintiff was the plaintiff at that time for that purpose. The
bill of exceptions in the record was taken and returned on
May term. The original bill of exceptions was not returned until
of the original, the affidavit in support thereof, and the
of the court. They appeared in the record on October 1st.

1930, plaintiff filed in this court an amended bill of exceptions purporting to contain the matters omitted from the original bill, but said amended bill was filed after the adjournment of the January term, 1930, without any order of the court having been entered during that term, allowing an extension of time beyond the term in which to file it.

In order to be reviewable, motions and rulings thereon must be incorporated either in a bill of exceptions or a stenographic report. (People v. Cowen, 283 Ill. 308.) Error assigned in the overruling of a motion for continuance cannot be considered on review where neither the motion nor the ~~suffice~~ supporting affidavits are made a portion of the bill of exceptions. (People v. Bush, 300 Ill. 532; People v. Hart, 323 Ill. 61; Coyne v. C. C. C. & St. L. Ry. Co., 208 Ill. App. 425; Mackin v. Cody, 68 Ill. 108.) The motion must be brought up by a bill of exceptions and the bill must be taken at the term when the rulings excepted to are made or within such time as the court may at that term grant for that purpose. (Kimber v. Kimber, 317 Ill. 561; Finch & Co. v. Zenith Furnace Co., 245 Ill. 586.) Exceptions can only bring in question the proceedings of the term at which the exceptions are presented, and cannot reach proceedings had at a previous term. (Finch & Co. v. Zenith Furnace Co., *supra*; Spring Valley v. Bureau County, 115 Ill. App. 545.)

The ruling of the circuit court denying a continuance at the January term is not preserved by a bill of exceptions and therefore is not reviewable. However, even if all questions had been properly preserved by bills of exceptions, still, the trial court committed no error in its rulings. We are of the opinion that the showing made by plaintiff did not entitle her to a continuance or to have the order denying it set aside.

The judgment of the trial court is affirmed.

Judgment affirmed.

1930, plaintiff filed in this court an amended bill of exceptions purporting to contain the matters omitted from the original bill, but said amended bill was filed after the adjournment of the January term, 1930, without any order of the court having been entered during that term, allowing an extension of time beyond the term in which to file it.

In order to be reviewable, motions and rulings thereon must be incorporated either in a bill of exceptions or a statement. (People v. Cowen, 233 Ill. 308.) Error assigned in the overruling of a motion for continuance cannot be considered on review where neither the motion nor the ruling supporting it have been made a portion of the bill of exceptions. (People v. Bugh, 300 Ill. 532; People v. Hart, 323 Ill. 61; Cowen v. G. O. & St. L. Ry. Co., 308 Ill. App. 482; Mackin v. Doherty, 68 Ill. 108.) The motion must be brought up by a bill of exceptions and the bill must be taken at the time when the rulings excepted to are made or within such time as the court may at that term grant for that purpose. (Nimber v. Nimber, 217 Ill. 321; Finch & Co. v. Genish Furniture Co., 245 Ill. 346.) Exceptions can only bring in question the proceedings of the term at which the exceptions are presented, and cannot reach proceedings not at a previous term. (Finch & Co. v. Genish Furniture Co., supra; Spring Valley v. Brown County, 113 Ill. App. 342.)

The ruling of the circuit court denying a continuance at the January term is not preserved by a bill of exceptions and therefore is not reviewable. However, even if all questions had been properly preserved by bills of exceptions, still, the trial court committed no error in its ruling. It is one of the cardinal rules that the showing made by plaintiff did not entitle her to a continuance or to have the order denying it set aside.

The judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



117
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

260 I.A. 334⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 25 1932
the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AMERICAN MEDICAL ASSOCIATION

PUBLISHED WEEKLY

CHICAGO, ILL., U.S.A.

VOLUME 10, NUMBER 1

JANUARY 1917

Subscription price, \$5.00 per annum in advance

Single copies, 15 cents

Entered as second-class

July 16, 1879

Postpaid

Postmaster: This journal is published weekly

except on Sundays and public holidays

and is paid for at special rate of postage provided for in

Act of October 3, 1917

Postage paid at Chicago, Ill.

Postage paid at New York, N.Y.

Postage paid at Philadelphia, Pa.

Postage paid at St. Louis, Mo.

Postage paid at Cincinnati, O.

Postage paid at Baltimore, Md.

Postage paid at Boston, Mass.

Postage paid at Washington, D.C.

Postage paid at San Francisco, Cal.

Postage paid at Portland, Me.

Postage paid at Seattle, Wash.

Postage paid at Denver, Colo.

Postage paid at Salt Lake City, Utah

Postage paid at Albuquerque, N.M.

Postage paid at El Paso, Tex.

Postage paid at Houston, Tex.

J. B. Whitehead,

appellee,

vs.

Appeal from the Circuit Court of

Winnebago County.

William Anderson and H. O.

Swanson,

appellants,

JONES, J:

This is an appeal from a judgment in favor of plaintiff upon a directed verdict. J. B. Whitehead instituted suit against William Anderson and H. O. Swanson, defendants, to recover upon a promissory note, given by defendants to plaintiff in payment of his commission for services rendered in bringing about a sale of real estate. The declaration contained a special count on the promissory note and the common counts.

Defendants pleaded the general issue and filed an affidavit of defense which set up that plaintiff was a real estate broker and employed several agents, particularly his son, Loren L. Whitehead, and one Lundin; that plaintiff for several years entrusted a large part of his business to his said son, who has been employed in plaintiff's office and in active charge of the business, managing and controlling it and superintending the work of other agents of the plaintiff; that while such conditions existed, Lundin, acting in concert with Loren L. Whitehead, approached defendant Swanson, and offered him 80 shares of the common stock of the Midway Hotel Company of Rockford, Illinois, in exchange for the equity that defendants owned in certain real estate; that the defendant Swanson thereupon went to plaintiff's office and closed the deal, exchanging said properties; that defendants inquired of Lundin and Loren L. Whitehead the name of the party purchasing defendant's real estate, and they, purporting to act in their capacity as employees and agents of plaintiff, who was employed to act as real estate brokers

J. B. Whithead,

appellee,

vs.

William Anderson and H. O.

Swanson,

appellants.

JONES, J.

This is an appeal from a judgment in favor of plaintiff upon a directed verdict. J. B. Whithead instituted suit against William Anderson and H. O. Swanson, defendants, to recover upon a promissory note, given by defendants to plaintiff in payment of his commission for services rendered in bringing about a sale of real estate. The declaration contained a special count on the promissory note and the common counts.

Defendants pleaded the general issue and filed an affidavit of defense which set up that plaintiff was a real estate broker and employed several agents, particularly his son, J. B. Whithead, and one J. B. Whithead, that plaintiff had several times entrusted a large part of his business to J. B. Whithead, who has been employed in plaintiff's office and in active charge of the business, handling and controlling it and superintending the work of other agents of the plaintiff; that while such relations existed, J. B. Whithead, in concert with J. B. Whithead, conspired to defraud plaintiff and offered him 80 shares of the common stock of the Illinois Loan Company of Rockford, Illinois, in exchange for the equity of defendants owned in certain real estate; that the defendants and J. B. Whithead went to plaintiff's office and closed the deal, and J. B. Whithead and J. B. Whithead, that defendants intended to J. B. Whithead the use of the name of the party purchasing defendant's real estate and they, purporting to act in their capacity as real estate agents of plaintiff, who was employed to act as real estate broker

for the defendants, falsely and fraudulently, in order to consummate said sale and collect a broker's commission for plaintiff, stated, "It is an outside party, who doesn't want to be disclosed or have his name mentioned."; that defendants believing and relying on such misrepresentation, executed a deed to said premises to one Blackstone, of whose identity they were not aware, and also executed a note to plaintiff in the sum of \$770, due in 90 days, for commission in making the sale and received said 80 shares of stock issued in the name of said defendants; that when said note became due, it was renewed and such renewal note is the note on which suit is pending; that after such renewal note was delivered, defendants first learned that said Blackstone was also an agent of plaintiff, employed in his office, and that he parted with no consideration for said property, and that such deed was made out in the name of Blackstone to conceal the fact that Loren L. Whitehead was actually purchasing the property and to induce defendants to pay a broker's commission to plaintiff; that at the same time said property was held in trust by Blackstone for the sole use and benefit of Loren L. Whitehead; and that defendants thereafter learned that said stock certificates, which were issued to defendants, were issued by said Midway Hotel Company for the surrender of stock certificates theretofore owned by Loren L. Whitehead.

Upon the trial of the case plaintiff offered the note in evidence and proved the amount of accrued interest thereon. He then moved the court to instruct a verdict in his favor for the reason that the purported defense was one of fraud, and that there was no special plea on file setting up fraud, and no notice of special matters of defense to be relied upon. The court on motion of defendants allowed the affidavit of defense to stand as notice of special matters of defense to be given in evidence by them. Thereupon, plaintiff again moved the court

for the defendants, falsely and fraudulently, in order to consummate the said sale and collect a broker's commission for plaintiff, stated, "It is an outside party, who doesn't want to be disclosed or have his name mentioned." That defendants believing and relying on such misrepresentation, executed a deed to said premises to one Blackstone, of whose identity they were not aware, and also executed a note to plaintiff in the sum of \$750, due in 30 days for commission in making the sale and received said 80 shares of stock issued in the name of said defendant; that when said note became due, it was renewed and such renewal note in the note on which said is pending; that after such renewal note was delivered, defendant first learned that said Blackstone was also an agent of plaintiff, employed in his office, and that he parted with no consideration for said property, and that such deed was made out in the name of Blackstone to conceal the fact that Loren I. Whitehead was actually purchasing the property and to induce defendant to pay a broker's commission to plaintiff; that at the same time said property was held in trust by Blackstone for the sole use and benefit of Loren I. Whitehead; and that defendant thereafter learned that said stock certificates, which were issued to defendant, were issued by said Midway Hotel Company for the surrender of stock certificates theretofore owned by Loren I. Whitehead.

Upon the trial of the case plaintiff offered the note in evidence and proved the amount of actual interest thereon. He then moved the court to instruct a verdict in his favor for the reason that the purported defense was one of fraud, and that there was no special plea on file setting up fraud, and no notice of special matters of defense to be relied upon. The court on motion of defendant allowed the verdict of defense to stand as notice of special matters of defense to be given in evidence by them. Thereupon, plaintiff again moved the court

to instruct the jury to find for him on the ground that the affidavit of defense and notice of special matters, as filed, did not as a matter of law, constitute a defense to the note.

The court, of its own motion ordered the affidavit stricken and instructed the jury to bring in a verdict for plaintiff. Judgment was entered on the verdict and this appeal followed.

Lundin and Loren L. Whitehead were purporting to act not as purchasers, but as sub-agents or servants of plaintiff. Their conduct in taking the note in plaintiff's name and his conduct in accepting it and suing thereon, estops him from denying that they acted for him in representing the defendants. The rule is that an agent cannot deny an agency for one purpose and recognize it for another. (Rigler v. Brent, 329 Ill. 21.) It is no defense that defendants secured all they asked for the property, and that thereby they suffered no damages. The rule is that an agent cannot either directly or indirectly have any interest in the sale of property within the scope of his agency, without the consent of his principal. It is of no consequence that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction by the agent. The rule is not merely remedial of wrong actually committed; it is intended to be preventive of wrong. A trustee may not put himself in a position in which, to be honest, there must be a strain on him. (Tyler v. Sanborn, 128 Ill. 136; Consumers Co. v. Parker, 277 Ill. App. 552; Johnson v. Bernard, 323 Ill. 527.) Even though a principal may not be prejudiced by such conduct, the agent's right to compensation is lost. (9 C. J. Brokers, 570, note 85; Sutherland v. Guthrie, 103 S. E. 298, (W. Va.); Perry v. Engel, 296 Ill. 549.)

If the matters set forth in the affidavit of defense could be proven, they would constitute a defense to the action by plaintiff. Defendants should have been permitted to make a

to instruct the jury to find for him on the ground that the affidavit of defense and notice of special matters, as filed, did not as a matter of law, constitute a defense to the note. The court, of its own motion ordered the affidavit stricken

and instructed the jury to bring in a verdict for plaintiff. Judgment was entered on the verdict and this appeal followed. Indian and Loren L. Whitehead were purporting to act not as purchasers, but as sub-agents or servants of plaintiff.

Their conduct in taking the note in plaintiff's name and his conduct in accepting it and suing thereon, estops him from denying that they acted for him in representing the defendant. The rule is that an agent cannot deny an agency for one purpose

and recognize it for another. (Higley v. Green, 229 Ill. 21.) It is no defense that defendants secured all they asked for the property, and that thereby they suffered no damages. The rule is that an agent cannot either directly or indirectly have any interest in the sale of property within the scope of his agency

without the consent of his principal. It is of no consequence that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction by the agent. The rule is not merely remedial of wrong, actually committed; it is intended to be preventive of wrong. A trustee may, of course, himself in a position in which, to be honest, there must be a refusal on his

(Tyler v. Sandborn, 129 Ill. 126; Commonwealth v. A. Walker, 277 Ill. App. 222; Johnson v. Barnard, 222 Ill. 224.) Even though a principal may not be prejudiced by such conduct, the agent's right to compensation is lost. (9 C. 2. Brokers, 270, note 22; Sutherland v. Guthrie, 103 C. 2. 228, 71 Va. 1; Terry v. Terry, 222 Ill. 242.)

If the matters set forth in the affidavit of defense could be proven, they would constitute a defense to the action by plaintiff. Defendants should have been permitted to make a

showing and to have established, if they could, the defense disclosed in their affidavit. The court erred in striking the affidavit and in holding that the matters averred therein, if proven, would not constitute a defense to plaintiff's action.

The judgment is reversed and the cause remanded.

Reversed and remanded.

showing and to have established, if they could, the defense in-
closed in their affidavit. The court erred in stating the affi-
davit and in holding that the matters covered therein, if proven,
would not constitute a defense to Plaintiff's action.
The judgment is reversed and the cause remanded.
Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
Opinion - January 6, 1931

8

A

260 T. A. 634⁵

General No. 8450

Agenda No. 13

October Term, 1930

HENRY H. ROCKWELL, EDNA M. MOORE and
RUTH ROEMMELE, Appellees,

vs.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation, Appellant.

Appeal from the Circuit Court of Vermilion County
SHURTLEFF, P. J.

This is an action of assumpsit by appellees against appellant on an accident insurance policy. The portions of the policy material to the case are as follows:

"This policy provides indemnity for loss of life, limbs, sight or time caused by accidental means, to the extent herein limited and provided.

IN CONSIDERATION of the registration fee of One Dollar (\$1.00) paid by the Insured and of the payment by the Tribune Company of advertising, acquisition, clerical and delivery expense valued at twenty-five cents per policy, the

FEDERAL LIFE INSURANCE COMPANY hereby does insure Frances H. Rockwell (hereinafter called the Insured) for a term of twelve (12) months from the date hereof beginning at noon Chicago standard time of the day this Policy is dated, against death, dismemberment or disability resulting, within sixty days from the date of accident, directly and independently of all other causes from bodily injuries sustained through external, violent

and accidental means for the amounts and in the manner set forth in Parts I, II and III. In the event of the death of the Insured, as herein provided, the amounts set forth in Parts I, II, or III for loss of life, shall be payable to Ruth and Edna and H. H. Rockwell (hereinafter called the Beneficiary) relationship Daughters and Son."

Part I of the policy referred to above covers loss sustained by the wrecking or disablement of any passenger vehicle or passenger car operated by a common carrier, and is not involved in this case.

This suit is based on Part II of the policy, the material provisions of which are as follows:

"The company will pay for loss of life \$2000.00 sustained by wrecking or disablement of any vehicle operated by any private carrier or private person in which the insured is riding or by being accidentally thrown therefrom."

Among the general provisions of the policy are the following:

"(2) This insurance does not cover

(a) Suicide or attempt thereat while sane or insane.

(f) Death or loss caused by any other means or conditions than those set forth in Parts I, II or III."

The death of the insured and the liability of the appellant are alleged in paragraph three of the declaration as follows:

"3. These plaintiffs further aver that said sum of \$2400 is due and payable to these plaintiffs upon the terms and conditions of said policy in that the said Frances H. Rockwell came to her death subsequent to said renewals and on, to wit, the 25th day of July, 1929, in the City of Danville, Vermilion County, Illinois, solely and exclusively by external, violent and accidental means, to wit, by being accidentally thrown from an automobile operated by a private person in which she, the said Frances

H. Rockwell, was then riding."

To this declaration appellant filed a plea of the general issues and also a special plea to the effect that the policy sued on did not cover suicide or attempt thereat while sane or insane, and that the insured committed suicide.

Frances H. Rockwell, the insured, was the mother of the appellees. She was sixty-seven years of age at the time of her death. Just previous to her death she had been in Lakeview Hospital in Danville, Illinois, for about two weeks, suffering from a general run-down condition and nervousness. Her attending physician left on his vacation and Dr. Baumgard, the physician who waited on the patient just previous to her death, testified that the woman was at the hospital to be fed up and rested; that she was undernourished and rather nervous; that he did not originally make an examination of the woman and diagnose her ailments, but that he attended her just three or four days before she died and he understood that she was at the hospital to be fed and rested.

On the evening of July 25, 1929, Henry H. Rockwell, son of the deceased and one of the appellees in this suit, who lived in Danville, Illinois, received word from the hospital that his mother might be taken home. He thereupon went to the hospital about seven o'clock in the evening, got his mother and started to his home with her. About a block north of the hospital the insured in some manner fell from the moving automobile and sustained injuries which caused her death. Henry H. Rockwell, the son, related the occurrence on the trial as follows: She fell out of the car—was thrown out of the car and hit on her head. She rolled over two or three times as she went out. I first noticed her going out of the car. I heard a noise that attracted my attention. I was looking out the other side of the car and,

of course, I glanced around right away and I saw her going out of the car. I made an effort to catch her but I could only get hold of her with my two fingers. I couldn't hold on to her, the weight was too much for me.

"Q. Describe how she fell out.

"A. Went right out and lit on her head."

On cross-examination Henry H. Rockwell testified that he had a conversation with his mother just before she fell out of the car; that he noticed her looking out of the car, turning her head from one side to the other and asked her what was the matter and she said "nothing;" that when he glanced back the door was open and that he didn't remember exactly as to whether she had her foot on the running board; that he testified before the Coroner's jury and might have said there, "When I glanced back she had the door open and one foot on the running board." As a matter of fact, the witness did testify at the Coroner's inquest that when he next noticed his mother after the conversation she had the door open and her foot on the running board.

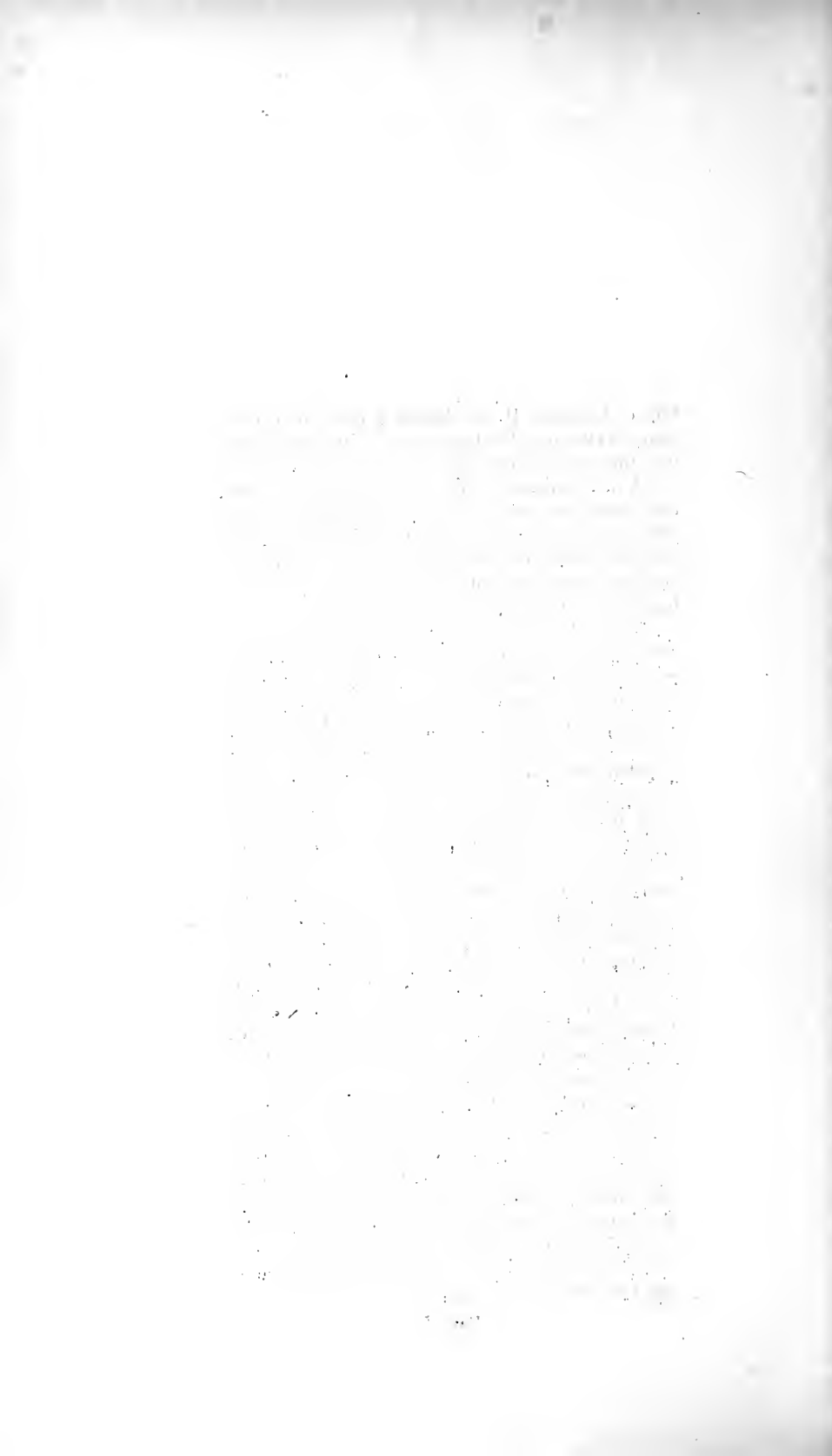
Just before the fall causing the injury the insured was riding in the front seat of the automobile with her son, the insured sitting on the right hand side of the front seat. Her son testified that the door on the side of the car on which his mother was riding opened from the inside by a sliding lever on the top of the middle of the door, that at times that door didn't fasten, but that on this particular occasion he closed the door on the side his mother was riding in when she got in the car at the hospital.

The street on which Lakeview Hospital is located and on which the insured and her son were traveling at the time she fell out of the car is Logan Avenue. **This street runs north and south and is and was at that time one of the through streets of the**

City of Danville. H. H. Rockwell testified that on going north from the hospital after his mother got into the car, he drove rather in the center of the street, there being no traffic on the street at that time; that Logan Avenue was paved with asphalt or some other composition and that the condition of the pavement was rough and had holes in it; that at the time and place his mother fell out of the car he was traveling twenty or twenty-five miles an hour.

The testimony as to the condition of the street where they were driving showed that it was paved with tarvia or asphalt or some other composition, was rough with holes and had waves in it; and either at that time or just a little previous had been in such bad condition that the city authorities had undertaken to patch it by filling in the holes. Mr. Sheets, street commissioner, describes the holes as slight depressions in the street possibly an inch or an inch and a half deep, of saucer shape and sixteen or eighteen inches wide; that the street, including the curbing, is thirty-six feet wide; that the pavement was a tarvia pavement made out of crushed stone and asphalt, except the gutter slab on each side about sixteen or eighteen inches in width, which was made of cement; that there were quite a number of these holes on both sides of the street and the street was a little wavy. He states that they were repairing this street on July 25, 1929, but did not know exactly what portion had been repaired at that time.

Marion Connor, street foreman under Mr. Sheets, stated that they had repaired more than one-half of the street on the east side, going north as far as the tarvia run and had changed their course and came back on the west side on the 25th day of July to about Mr. Tincher's residence, which is south of the point where the insured fell out of the car; that the condition of the street after it had been repaired was fair and the witness later stated



that it was in good condition; that the holes that they had filled up were saucer-like in shape where the rock had been cut away by the wheels of automobiles threshing it out; that the holes before it was repaired were of different depth. On cross-examination he testified as follows: "When we got through there might have been little waves like in any street in town or any place; no deep waves. There were holes we were filling up. We filled the holes with chipped stone and put the tarvia on. We tamped the stone down and then covered it with asphalt. There might have been some waves left; that some of the holes were possibly an inch or an inch and a half deep and there were quite a few of these holes; they extended for a block from Fairchild north and more. These holes were, I should judge, eighteen or twenty inches around there, some of them smaller than that." Three men were working there and they had other repair work going on at that time over which he had charge. He was just overseeing the work and was not there all the time.

Charles Hazel was employed in the repair work on Logan Avenue and states that they repaired the east side of the street first, but he doesn't remember where they were on the 25th day of July; that the places they repaired "were kind of waves" in which they put chipped rock, tamping it down and then covering it with asphalt. The waves were caused by the uneven surface of the street.

J. C. Dewey, a traffic or motorcycle officer in Danville, on direct examination testified that he traveled over the street frequently before it was repaired for six years by motorcycle, and that the street was in fairly good condition before the repairs were made; that the traffic on the street was always heavy; that he had ridden on the street from five to seventy-five miles per hour, but on cross-examination could not fix any time in July or any definite rate of speed when he had ridden his motorcycle

over that portion of the street. He stated, " I didn't ride in the center of the street exactly; it all depends where the car is I am after." He stated he could remember several instances when he had ridden his motorcycle down the street at seventy-five miles per hour but couldn't tell the date.

This case was tried twice. At the first trial the jury disagreed and on the second trial the jury found the issues for appellees and returned their verdict for \$2474.02, which was the full amount claimed under the policy.

At the close of all the evidence the appellant made a motion to instruct the jury to find the issues for the defendant and tendered a written instruction with said motion, but the court denied the motion and refused to give the instruction, to which action of the court the appellant duly excepted. Appellant also filed a motion for a new trial which was overruled by the court and appellant excepted. The court thereupon rendered judgment for the appellees and against the appellant for the amount of the verdict and costs and the appellant excepted and has brought the record to this court, by appeal, for review.

Two errors are argued by appellant as a ground for reversing this judgment. First, it is insisted that the testimony shows that the deceased opened the door of the car, or the door opened by accident, stepped on the running board of the car and ejected herself from the car in an attempt to commit suicide. It is insisted by appellees that it is possible that the movement of the body of the car, due to the driving over a wavy, rough pavement, would cause the door, which had been coming open at previous occasions—possibly due to some defect in the latch—to come open. When the door did come open she had no leverage or protection from being thrown out of the car.

Counsel for appellant attempted to bring out on cross-examination that Rockwell had made the following statement before the coroner's inquest: "When I glanced back she had the door open and one foot on the running board," and Rockwell testified that he didn't remember whether he had said that or not. Counsel then attempted to impeach Rockwell by the witness Esther Balsley, a stenographer in the coroner's office, who stated as follows: "He happened to notice that his mother was rather excited or something and he turned around and asked his mother what was the matter and she said nothing, son, and then the next time he turned around he noticed that she had one foot on the running board and he let loose of the wheel and was going to grab her but she slipped out of the car." This statement shows a conclusion of the witness as to the language used by Rockwell and on cross-examination she said she wouldn't say whether Rockwell had used the word "excited" and was not positive that he had said she had her foot on the running board or that her foot might have been out on the running board. She said that she didn't get from the evidence that the insured was standing on her foot at any time on the running board. The testimony of Rockwell is that his mother went out of the car head first and lit on the back of her head, turning completely over.

In the absence of proof to the contrary the presumption is that the insured was sane and would not have taken her own life. (**Grand Lodge Independent Order of Mutual Aid v. Wieting**, 168 Ill. 408; **Fidelity & Casualty Co. v. Weise**, 182 Ill. 496; **Miner v. New Amsterdam Casualty Co.** 220 Ill. App. 74; **Wilkinson v. Aetna Life Insurance Co.** 240 Ill. 205.) Such presumptions have all the force and effect of evidence until overcome by proof, and while the burden is upon plaintiffs to prove that the death of the insured was the result of an accident from external, violent and accidental means,

in the case of **Wilkinson v. Aetna Life Insurance Co.**, **supra**, the court held: " 'The presumption of the law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient, within itself, to establish **prima facie** that death occurred otherwise than by self-destruction and to cast upon the defendant company the burden of producing evidence on the point.' "

An accident is usually defined as an event that takes place without one's foresight or expectation. It is the antithesis of intentional, and distinguishable from acts that are voluntarily done or conditions produced by acts voluntarily done. It is produced by means which were neither designed nor calculated to cause it, which is accidental means. (14 R. C. L. 1238, Insurance sec. 418; **Fidelity & Casualty Co. of N. Y. v. Morrison**, 129 Ill. App. 360.)

From all the proofs in this cause it is undisputed that the deceased was thrown from the moving car and by the motion of the car. The only question in dispute is, whether the act was accidental, without the foresight or expectation of the deceased, or whether it was brought about by her determination or with suicidal intent, and upon that question the jury has passed contrary to the contention of appellant, and we are not disposed to interfere with the finding of the jury.

It is next contended that the court erred in not giving the following instructions: "The court instructs the jury that before the plaintiffs can recover in this case they must prove by a preponderance of the evidence that the deceased was 'thrown' from the automobile; the fact that the deceased fell from the automobile, or voluntarily stepped therefrom, is not sufficient

to justify a verdict in favor of the plaintiffs.

The court instructs the jury that if you believe from the evidence that the deceased fell from the automobile in which she was riding, or that she voluntarily stepped therefrom, then and in such state of the evidence, it is your duty, under the law and under your oaths as jurors, to return a verdict in favor of the defendant." These instructions were refused. Appellant, on the trial, offered the following instruction: "The court instructs the jury that if you believe from the evidence that the deceased was not 'thrown' from the automobile in which she was riding, then, under the law and under your oaths as jurors, it is your duty to return a verdict in favor of the defendant," which was given.

Appellee^{aut} was entitled to an instruction upon that subject, but appellee^{aut} was not entitled to various forms of the instruction nor to argumentative instructions, and appellee^{aut}, having submitted the various forms of the instruction, and the court having selected a form which we conclude covered the construction to be given to the language of the policy we cannot hold it was error to refuse the other two forms.

Finding no error in the record sufficient to warrant a reversal, the judgment of the Circuit Court of Vermilion County is affirmed.

Affirmed.

Abstract

Agenda Jan 26 - 1931

9

A

260 I.A. 6351

General No. 8454

Agenda No. 49

October Term, A. D. 1930

Walker-Broderick, Inc., a Corporation, Plaintiff in
Error,

vs.

Annie Berkson and Saretta B. Cohen, Defendants in
Error.

Writ of Error from the Circuit Court of DeWitt County
SHURTLEFF, P. J.

This suit is an action in assumpsit brought by the plaintiff in error, Walker-Broderick, Inc., a corporation, against the defendants in error, Annie Berkson and Saretta B. Cohen, to recover brokerage fees for the sale of certain real estate in the City of Chicago, which the defendants in error had placed with the plaintiff in error for sale.

The plaintiff filed the common counts with an affidavit of claim, which affidavit is as follows:

Daniel Walker, of the County of Cook and State of Illinois, makes oath and says that he is a stockholder and officer in the Walker-Broderick, Inc., a corporation, of the County of Cook and State of Illinois; and that he is the duly authorized agent of said corporation; that the demand on the plaintiff in the above entitled suit is for commission due to the plaintiff from the defendants for the sale of certain real estate in the City of Chicago, County of Cook and State of Illinois; upon a contract between the plaintiff and defendants; that there is due to the plaintiff from the defendants, after allowing to them all just credits, deductions and set-offs, the sum of \$1,850, with interest thereon from the 23d day of July A. D. 1928, at the rate of five per cent per annum.

The defendants pleaded the general issue and filed separate affidavits of merit, which are as follows:

Annie Berkson, upon her oath, being first duly sworn, says that she is one of the defendants in the above entitled cause, and that she verily believes that she has a good defense to this suit, upon the merits to the whole of the plaintiff's demand.

Saretta B. Cohen, upon her oath, being first duly sworn, says that she is one of the defendants in the above entitled cause, and that she verily believes that she has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Plaintiff in error insists that the affidavits of merit filed by the defendants were not sufficient; that said affidavits, and each of them, failed to specify the nature of the defendants' defense, as required by the 55th section of the Practice Act; that by failure to file a sufficient affidavit of merits, the defendant's admit plaintiff's case, as set forth in the affidavit of claim; that the court should have entered judgment for the plaintiff on its motion for judgment **non obstante veredicto**;

The suit was brought upon the common counts only, and while proofs of the contract were admissible under the common counts, no motion was made in the court below to strike the affidavit of merits and the motion comes too late after a verdict.

Chalkowski v. Szafranski, 250 Ill. App. 360, where it is held:

"The same rule obtains with reference to an insufficient affidavit of merits or where, as here, one of the defendants did not sign the affidavit of merits. Where the plaintiff takes issue on the plea and goes to trial without any affidavit of merits, the filing of an affidavit is considered waived. **Lahiv v. Fleishman**, 165 Ill. App. 312; **Peerless Pattern Co. v. Silverbloom Dry Goods Co.**, 211 Ill. App. 194."

Objections to the affidavit of merits not pointed out to the trial court cannot be raised in the reviewing court. **Spengler v. Eiger**, 255 Ill. App. 329.

Plaintiffs in error offered proofs tending to show that under a contract of brokerage to sell real estate, it furnished a purchaser, ready, able and willing to purchase the lands of defendants in error, and a purchaser who did purchase the lands from defendants in error, but that defendants in error closed the contract with the purchaser, one Fishman, at a lower price than plaintiff in error had been permitted to make and without the knowledge of plaintiff in error, and that defendants in error refused to pay any commission.

Proofs were offered by defendants in error tending to show that the real estate was placed in the hands of plaintiff in error to sell at a net price, namely, sixty-two thousand dollars, and that Fishman would not pay more than \$55,500 for the lands; that before making the sale, as defendants in error claim, Fishman agreed to pay the commission and plaintiff in error agreed to accept Fishman's promise to pay the commission and understood that defendants in error were to pay no commission. The testimony was contradictory upon this phase of the case. There was no dispute but that plaintiff in error produced Fishman as a purchaser, who purchased and paid for the lands. There is no doubt about the rule of law in this State that where an agent is employed to sell real estate for the owner and is instrumental in bringing the owner and the buyer together and the owner then concludes the sale at a less price than the agent was authorized to sell for, the agent is entitled to compensation for his services. (**Francisco v. Coleman**, 230 Ill. App. 470; **Wright v. McClintock**, 136 Ill. App. 438; **Wilson v. Mason**, 158 Ill. 304; **Hafner v. Herron**, 165 Ill. 242; **Edison v. More**, 226 Ill. 382; **Fox v. Ryan**, 240 Ill. 396; **Carter v. Webster**, 79 Ill. 435.)

We find no formal contract entered into in this case other than the verbal listing of the property with plaintiff in error and the conversation at that time.

Much complaint is made by plaintiff in error as to the instructions given for defendants in error. The ninth instruction was as follows: "The court instructs the jury before the plaintiff can recover in this case the plaintiff must show by a preponderance of the evidence the following:

"1. That it was employed by the defendants to sell the real estate in question.

"2. That for such services that the defendants were to pay the plaintiff the reasonable and customary charges for like services in the community where the services were rendered.

"3. That the plaintiff procured a buyer who was ready, able and willing to buy on the terms proposed.

"4. That the plaintiff was the procuring and efficient cause of the sale having been made.

"And the court further instructs you that unless the plaintiff has proved each of the foregoing propositions by the greater weight of the evidence, or if the proof is evenly balanced or preponderates in favor of the defendants on any one or more of the foregoing propositions, then in that event of the proof it would be the duty of the jury to find for the defendants."

The eleventh instruction was as follows: "The court instructs the jury that if you believe from the evidence in this case that the property of the defendants was listed with the plaintiffs, with the understanding that the price, if any she gave them, was net to her, and that she was not to pay a commission to them for the sale of same, then and under that state of proof, if such is the proof, she is not liable for any commissions to them for the sale of said premises."

The twelfth, thirteenth and fourteenth instructions were as follows:

"12. The court instructs the jury that if you believe from the evidence in this case that the plaintiffs failed to furnish a purchaser of the property in question to the defendants, which purchaser was ready, willing and able to buy the real estate in question, then they are not entitled to recover in this case for commissions on the sale of said real estate, and under that state of proof, if you believe such is the proof in this case, you will find the issues for the defendants.

"13. Even though the jury may believe from the evidence in this case that the defendants originally employed the plaintiff to sell the property in question and that, pursuant to such employment, the plaintiff procured the man who subsequently bought the property, yet you are further instructed that if you believe from the evidence that, before the contract for the sale of the property in question was made, the plaintiff agreed to look to the buyer of the property for their commission, then there can be no recovery in this case, even though the buyer of such property did not pay such commission.

"14. The court instructs the jury that if the jury believe from the evidence that the defendant Anna Berkson listed the property in question with the plaintiff, and at the time of such listing she informed the plaintiff in substance that for their services in the sale of the property in question they would have to collect the commission from the buyer, or that the price made by the said defendant for such property was to be net to the owners, and if you further believe that at that time and on that occasion the plaintiff made no objection to such arrangement, then you are instructed that, even though you may believe that thereafter the plaintiff notified the defendants, or either of them, that they, the plaintiffs, would hold the defendants responsible

for the commission, yet, unless you believe that the defendants then and there agreed to pay such commission, then in that extent of the proof of the defendants would not be liable in this case and your verdict should be for the defendants."

These instructions do not state the law as laid down by this court in **Rasar & Johnson v. Harry Spurling**, 176 Ill. App. 349, and in **Francisco v. Coleman**, 230 Ill. App. 470, and other cases that should be applied to this case. The only issue of defense tendered by defendants in error was that Fishman, the purchaser, agreed to pay the commissions earned, and plaintiff in error released the defendants in error. Some testimony was offered to this effect. The instructions of defendants in error ignored this issue, which resulted in numerous fanciful issues being presented to the jury and other questions which were not the law of the case. Some of the instructions set out particular facts and phases of the case that were not in issue and ignored other phases of the case that were in issue.

In **Rasar & Johnson v. Spurling**, *supra*, this court held:

"The first instruction given on behalf of defendant told the jury that before plaintiffs could recover it was necessary that they should show by a preponderance of the evidence not only that they had procured a purchaser, in accordance with their contract of employment, who was ready, able and willing to buy upon the terms expressed in the contract of employment, but that they must also show by a preponderance of the evidence that they were the efficient cause in effecting a sale of the premises according to the terms mentioned in the contract of employment, or on other terms agreed upon. This instruction is not a correct statement of the law. Plaintiffs were entitled to recover if they found a buyer who was ready, able and willing to purchase the property on

the terms of the original contract, or to whom defendant finally sold the property upon other terms agreed upon by the purchaser and defendant, and it was not necessary that a purchaser should be obtained who was ready, willing and able to purchase upon terms agreed upon by and between the plaintiffs and the defendant. **Hafner v. Herron**, 165 Ill. 242."

In **Francisco v. Coleman**, *supra*, the court held: "Coleman saw fit to let the matter drift and closed the deal through his new brokers without making any effort to protect his original agent, who was unquestionably the procuring cause of the sale. Under such circumstances the defendant cannot avoid the payment of the commissions agreed upon. (**Rigdon v. More**, 226 Ill. 382; **Ogren v. Sundell**, 220 Ill. app. 584; **Hafner v. Herron**, 165 Ill. 242.) The defendant urges that under the contract of employment the plaintiff was to receive only what he could obtain over \$200 an acre in case he effected a sale, and inasmuch as the farm was sold for no more than \$200 an acre the plaintiff therefore has no just claim for commissions. We cannot agree with this contention. In the first place, according to plaintiff's testimony, he was to receive a commission of two and one-half per cent in case a sale of the farm was concluded by the owner with a purchaser produced by the plaintiff."

Other errors in other instructions are pointed out which will, without doubt, be corrected upon another trial. The instructions were contradictory. For example, the court gave plaintiff in error's fourth instruction as follows: "The court instructs the jury that, if you believe from the evidence in this case that the defendants employed the plaintiff as their agent to negotiate the sale of certain of the defendants' real estate and that the plaintiff undertook said employment and was instrumental in bringing together the buyers and the defendants, then, in that case, the

plaintiff is entitled, as a matter of law, to recover from the defendants compensation for his services, regardless of the fact that the defendants themselves concluded the sale and upon a price less and upon terms different from those which the plaintiff was authorized to sell," and defendant in error's seventeenth instruction as follows: "The court instructs the jury that if you believe from the evidence in this case that at the time the property in question was listed with the plaintiff that the same was listed upon a price net to the defendants, and even though you further believe from the evidence thereafter the price was changed, yet unless the plaintiff has proven by a preponderance of the evidence that the defendants, or one of them, after the original listing of said property, agreed to pay the commission for the sale thereof, then in that event of the proof there can be no recovery in this case by the plaintiff and your verdict should be for the defendants."

These instructions contradict each other and the last instruction does not state the law. With the instructions as given, which constitute reversible error, it is difficult to see how the jury could have found a different verdict.

It is suggested by defendants in error that the record fails to disclose that plaintiff in error was a licensed broker under the statute and that it is neither shown in the affidavit of claim or in the evidence. The declaration is not abstracted and no objection of this kind appears to have been made in the court below. There was no demurrer to the declaration or objection made to the affidavit of claim and we must assume that plaintiff in error's capacity to sue was established in the lower court.

For the errors pointed out, the judgment of the Circuit Court of DeWitt County is reversed and the cause remanded.

Reversed and Remanded.

Abstract

Opinion Jan 26 - 1930

10 F

260 I.A. 635²

General No. 8456

Agenda No. 16

October Term, 1930

MAMIE C. HAWORTH, Appellee,

vs.

OKAW PROVIDENT RELIEF ASSOCIATION
(A Mutual Benefit Association). Appellant

Appeal from the Circuit Court, Shelby County

SHURTLEFF, P. J.

Appellant is a mutual insurance association, operating under the laws of the State of Illinois. Appellee's husband in 1927 took out a policy of insurance in appellant company. He paid before his death, May 22, 1929, every assessment that was assessed against him. His policy had in it a paragraph that sets out in full the contract or agreement in regard to the payment of assessments, as follows:

“NOTICE OF ASSESSMENT: Upon the death or disability of any member of this association who is in good standing and information of such being given to the secretary of the association, it shall be the duty of said secretary to promptly mail the beneficiary a blank proof of claims on which claim can be filed. Upon receipt of this blank properly executed, the secretary shall submit same to the directors of the association, whose duty it shall be to determine whether or not the association is liable. If they approve the claim, each member of this association shall pay the sum of such assessment ordered by the board of directors. Such assessment shall be due and payable within thirty days from and after date of the notice stating that such assessment is due; and the mailing by first class mail of such notice to his last address as



given by the member to the secretary shall constitute due and legal notice. Upon failure of any member to pay any assessment levied upon him within thirty days the association may declare the certificate cancelled upon a further notice sent by first-class mail addressed to such member to his last given address that his certificate will be cancelled if payment is not made to the association within ten days of the mailing of such cancellation notice."

On March 1st, April 1st and May 1st, 1929, assessments were levied against the deceased and notices given, but the assessments had not been paid. On May 13, 1929, appellant mailed to the insured, John W. Haworth, a notice stating: "This is to notify you that the claims of members named below were promptly paid. This assessment of one dollar is payable within thirty days from date of call (May 1, 1929), or not later than June 1, 1929, and is to reimburse the benefit fund," etc. Then follows the names of deceased members.

On May 21, 1929, appellant gave a receipt to Kleon Haworth for three dollars, stating in the receipt: "Not accepted as payment of dues for J. W. Haworth, but held as reason for possible adjustment for reinstatement of certificate No. 3329."

The insured died May 22, 1929. No action had ever been taken by appellant to cancel the Haworth policy or to dismiss Haworth from the association. The policy contract between the deceased and appellant contains the following provisions:

"The Okaw Provident Relief Association hereby agrees that in consideration of the payment of the charter members' fee of \$5.00, the receipt of which is hereby acknowledged, and the payment of such further assessments of not to exceed \$1.00 if necessary to meet the claims and expenses of the association, John W. Haworth, (hereafter called the member) is entitled to all the benefits of this association. In the event of the natural death of said

member, Mamie C. Haworth, Shelbyville, Illinois, named as beneficiary, is entitled to an amount not to exceed \$800.00. The total liability of the association on any claim shall not exceed \$1.00 per member of the total remaining members in good standing.

“Upon the death or disability of any member of this association who is in good standing, and information of such fact being given to the Secretary of this Association it shall be the duty of said Secretary to promptly mail the beneficiary a blank proof of claim on which claim can be filed. Upon receipt of this blank properly executed, the Secretary shall submit same to the Directors of the Association, whose duty it shall be to determine whether or not the association is liable. If they approve the claim each member of this association shall pay the sum of such assessment ordered by the Board of Directors. Such assessment shall be due and payable within thirty days from and after the date of the notice stating that such assessment is due; and the mailing by first class mail of such notice to his last address as given by the member to the secretary shall constitute due and legal notice. Upon failure of any member to pay any assessment levied upon him within thirty days the association may declare the certificate cancelled upon a further notice sent by first-class mail addressed to such member to his last given address that his certificate will be cancelled if payment is not made to the association within ten days of the mailing of such cancellation notice.

“Any member having been suspended for failure to pay any contribution and wishing to be reinstated may secure reinstatement by paying the delinquent assessment and a reinstatement charge of fifty cents; provided that such member shall at the time sign a statement to the effect that he is in good health at the time of the reinstatement; and said certificate shall be non-contestable

one year from date of reinstatement except as herein specifically provided * * * *

"This certificate is issued in consideration of the application for membership in said association heretofore executed and personally signed by said assured member, a copy of which application is attached hereto and made a part thereof; and said certificate and application constitute the entire contract between the member and the association."

There was a trial by jury and a verdict and judgment for appellee, from which judgment appellant has appealed to this court.

It is contended by appellant that under section 435 (9) of chapter 73 of the Revised Statutes that it is expressly provided that a loss shall be paid by a mutual benefit association not later than three months after the date due proof of death shall have been received; and under section 435 (11) of the same chapter the statute provides that upon the failure of any member of a mutual benefit association to pay any assessment levied upon him within the time named in the notice thereof the association may declare his certificate cancelled if payment be not made within ten days of the mailing of the notice therefor; and that the same statute expressly provides that a mutual benefit association shall not be liable on any one certificate for an amount greater than one dollar per member in good standing.

While the defense that a member is not "in good standing" because of misconduct requires formal record action by an association, his default in paying dues or assessments may be shown by any legitimate proof; and his failure to pay his assessments, without valid excuse on his part and without fault on the part of the association, is competent evidence of loss of good standing. In **Independent Order of Foresters v. Zak**, 136 Ill. 188, the sum named in the certificate was payable if the member at the time

of his death was in good standing.

“A member is said to be in good standing when he complies with the laws, rules, usages and regulations of the order. Such compliance necessarily includes punctual payment of all dues and assessments for which the member may become liable.” (**Royal Circle v. Achterrath**, 204 Ill. 564.)

Appellant under the rules cited indicates that it considered Haworth a member in good standing by levying an assessment upon him on May 1, 1929, although two prior assessments were unpaid. Testimony was offered by appellee tending to show that Haworth had been permitted at former times to pay assessments quarterly when the assessments had equalled three dollars. The question of good standing is a matter of proof and the burden is on the insurer to make such proof, and where the insurer continues to treat the insured as in good standing the insurer is bound by such action. The judgment in this case is supported by the facts and the law in **Northwestern Traveling Men's Ass. v. Schauss**, 148 Ill. 304, and **Conductors' Benefit Ass. v. Tucker**, 158 Ill. 194.

Finding no ground for error, the judgment of the Circuit Court of Shelby County is affirmed.

Affirmed.

Abstract

Opinion Jan 26 1931



260 I.A. 635³

General No. 8471

Agenda No. 28

October Term, 1930

ROBERT MARION, a Minor, by Emma Marion, his
Next Friend, Appellee,

vs.

ALLITH PROUTY COMPANY, a Corporation,
Appellant.

Appeal from the Circuit Court of Vermilion County
SHURTLEFF, P. J.

Appellant, by this appeal, seeks to reverse a judgment against it in the Circuit Court of Vermilion county, in favor of appellee, for \$6,500, in an action of trespass on the case for a wilful violation of the Illinois Occupational Disease Act. There were two counts in the declaration and charged in substance:

First: That appellant, a large employer of labor in its factory, wilfully failed to equip its buffing machine (which caused much emery and pumice stone dust to permeate the air and be inhaled by the appellee, its operator), with such reasonable and approved devices, means and methods in common and general use, such as face breathing masks, fans, suction pipes, respirators, exhaust devices and the like, or substitute **devices, for the prevention of Industrial or Occupational Disease, or illness or disease incident to said work and process as carried on, and to prevent said dust from being breathed by appellee and inflaming and irritating his sinuses and thereby producing sinus trouble, nose bleed, cold in the head, inflammation of the blood vessels, organs and tissues of the head, causing inability to work and permanent injury.**

THE UNIVERSITY OF CHICAGO

LIBRARY OF THE UNIVERSITY OF CHICAGO
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
U.S.A.
TEL: 773-936-5000
FAX: 773-936-5000
WWW.CHICAGO.EDU
CHICAGO, ILL. 60637
U.S.A.
TEL: 773-936-5000
FAX: 773-936-5000
WWW.CHICAGO.EDU

Second: This count is substantially the same as the first, except the Occupational Disease Act is not specifically referred to.

The facts as set out in appellee's statement of the case are, that from May to October, 1928, and for years prior thereto, the appellant was a large employer of labor and was engaged in melting, molding and polishing Ford automobile castings and building hardware; five or six hundred men were thus employed. It had one main large building twenty-seven or twenty-eight feet high, two hundred fifty feet long, and three hundred feet wide, with partitions extending from the floor to the roof. It had ten or eleven compartments in which were operated twenty-five or thirty drill presses to cut holes in metal, power jacks to cut Ford castings, and lathes to smooth them. There were also storage rooms, dipping and polishing tank rooms.

In the center of said building was one large compartment in which appellee, then eighteen years old, worked. It was seventy-five feet wide and one hundred seventy-five feet long, and in which the greasy rough castings that came from the foundry, were brought to be polished by an electrically driven polishing machine.

This machine set on the floor and consisted of a wheel called a buffer, covered with emery on rubber or felt, and which revolved very rapidly. This wheel was about three inches in diameter and on the end of a revolving rod. It was about five feet high and two feet wide. Castings were held by the hands against this revolving buffer wheel which polished them; the felt or rubber on this wheel became gummed at times so it was necessary to apply pumice stone (which came in big cakes of a grayish color) against said wheel while it was moving, sometimes on each casting, and other times on the tenth or fifteenth casting, the frequency

depending upon the gummed condition of the casting, caused by the grease and oil.

Appellee began working on this polishing machine in June, 1928, polishing Ford castings. He stood and worked within a foot or a foot and one-half of the machine, and every time he applied pumice stone to said buffer, dust flew up in his face and nose and all around and about, and rolled out and whirled around like a big fog, so thick at times that the operator could not be seen by other workmen passing near by, and extended thirty or forty feet from him and settled on the machinery and his clothes. Dust always followed the operation of the machine. Emery dust was dark and pumice stone was grayish and was a cutting dust, but not as sharp as emery.

Appellant had provided reasonable and approved devices, means and methods for eliminating such dust in another compartment in the building, but none was provided for appellee.

Face masks or respirators are used in factories. They fit over the head and a piece of rubber inserts in the mouth with cotton and other material to breathe through, which prevents inhaling gases or dust; it is absorbed or strained. Fans and exhaust devices are used, which work on a blower near the machine and having suction pipes which pull the dust away from the machine and blow it outside; also exhaust fan devices made of metal, funnel shaped, through which suction of air pulls the dust away from machines.

Ventilation where appellee worked was by windows and doors. Masks were provided and used in the nickel plating room where they polish nickel plate and in the dip room where they dipped paint and sprayed paint. They also had suction devices fastened underneath the buffer of the polishing machine in another compartment. But no such fans, masks, or suction devices were provided appellee.

When appellee entered said employment his health was good. There was nothing wrong with his nose, eyes, face, mouth, throat,

lungs or sinus. He weighed one hundred forty-five to one hundred fifty pounds and he had not been working at anything else. Shortly after he started working on this machine he underwent a physical change in all of said respects and the Safety First Committee in the factory notified the nurse and assistant superintendent to put up an apparatus to suck the dust away from appellee or to furnish him a mask or blower, and the superintendent said it could be done but never was done. In two or three weeks appellee's eyes became irritated, watery, inflamed, red and swollen, his face swollen and along the side of his nose to such an extent that it was almost even with the end of his nose and the side of his face. His nose was caked, he sneezed, "felt like his head was stopped up," mucous ran from his nose; had headaches; mouth and throat were dry; he coughed and had colds nearly all the time; "couldn't hardly breathe through the nose; had to fight for breath at night;" couldn't sleep; breathed through his mouth; nose was raw and burned and two or three times a day it would bleed sometimes as much as a pint and sometimes for five or seven minutes; he couldn't work steadily.

Dr. Crispin, the company doctor, examined him and sent him to Dr. Jewell, an eye, ear, nose and throat specialist. He had to lay off work one or two months in the fall and was under Dr. Jewell's care until February, 1929. On December 28, 1928, he went back to work at an outside job away from the dust and stayed until August 9, 1929, when, on account of his condition he was compelled to quit and has not worked since. From December to August he had colds all the time and nose bleed; his nose was irritated, stopped up; he couldn't hear, had headaches all the time, could hardly breathe and fell off in weight. Appellee and several other witnesses described his condition as we have set forth and there was no evidence to the contrary.

Appellee's illness was first noticed two or three weeks after he began working on this machine. The antrum-hymore maxillary sinus from the nose down into the side of the face, which opens into the nasal passage, contained pus, had infection and was draining through the nose. The sinus was inflamed. Sinus is caused by bacteria. Where conditions are ideal germs multiply quickly. A bad cold and specific organism bacteria would grow better in that extreme than in any other place. If the nose were in normal condition it would not be ideal for germs to multiply.

Doctor Jewell found sinus trouble and just a few days before the trial his last examination disclosed irritation of the sinus, a congestion of the middle turbinate bone, and congestion of the lining of the nose in the right side. It was his opinion that the condition described in the hypothetical question describing his work at this machine, in the dust during his employment, would cause the condition in his nose and in his sinuses, by the dust entering the nose, setting up an irritation and causing a swelling of the lining and its different parts, interfering with drainage from the sinus or the natural openings in the sinus, and following on the heels of the irritation infection could set in that would be the mechanism of the way in which that trouble could be caused; that the condition of the sinus would cause an impairment of the hearing, as the extension of the inflammation of the nose back over the opening of the ear into the throat of the Eustachian tube, and the inflammation and irritation caused swelling of the tube which would interfere with the hearing; that the sinus trouble would cause headaches, and that the work he did and the dust had a connection through said irritation and infection of the nose and sinus, and conditions under which he worked would cause nose bleeding and repeated and continued headaches and inability to sleep, and that this condition was permanent, and his ability to do manual labor in the future, where there was dust, would be impaired.

Heavy lifting or heavy work would have a tendency to increase congestion which might cause nose bleed or headache. Doctor Allison and Dr. Baumgart, each of whom personally examined appellee at different times, corroborated said facts and the opinion of Dr. Jewell that his condition was permanent.

Doctor Allison examined him with special reference to the sinuses, nose and nasal passages, and used a speculum, opening the nose widely and throwing a strong light back of the inside of the nose and found some very much congested sinuses, red, and a great deal of mucous or pus in the back part of it, especially on December 13th and 15th, and the 4th of February; found darkness in the frontal sinuses which indicated inflammation, indicated infection had extended from the nose to the maxillary sinus and the patient had more or less chronic discharge from that place and a great deal of pain; had a headache which came more or less at different times of the day; with such condition patient could not sleep. Sinus infection from a medical standpoint comes from one thing—infection of the nasal passage, nose and post-nasal. There is a connection between the organ of hearing and the mouth and nose apparatus, between the posterior part of the nose above the soft palate, and in the back part of the nose is a little opening called the Eustachian tube, extending from there to the middle ear. Irritation or inflammation of the back of the mouth or the back of the nasal cavity will act in that case just like it does in the nasal passage. Irritation coming from the nasal passage into the sinus extends up to the Eustachian tube into the middle ear and affects it.

Breathing of such dust as pumice stone and emery for a long period of time could cause an inflamed condition which would result from the bacteria forming, and it would cause an injury to the auditory organ, the ear, which would interfere with hearing. The breathing of such dust from the last of June until the 25th

1. The first of these is the fact that the
the second is the fact that the
the third is the fact that the

the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the

the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the

the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the

the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the

the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the

the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the

of October on the average of about nine hours a day, would be long enough to produce irritation there, and if a person during such period of time should breathe such dust as emery and pumice stone it would, from a medical standpoint, where the nasal mucous had been irritated chronically, cause a tendency to catch colds more easily and such a congestion and inflamed condition as described, that he saw there, would tend to cause Robert Marion to take cold more easily than if the congestion was not there. The most common cause of sinus in this country is the common cold; then there are irritating dusts such as sand or silica, gravel, pumice stone—any of those hard cutting stones. Soft coal dust is a soft dust, not cutting.

For the appellant, Doctor Jones, eye, ear, nose and throat specialist, saw appellee on May 27, 1929, made an examination and expressed an opinion that sinusitis, or infection of the sinus, could not have been produced under the conditions specified in the hypothetical question, which did not contain the material facts. From his examination, however, he says that he is not quite sure about the disease at the time and that experts differ in their opinion, but that sinus troubles are germ diseases, must be infections and usually start where there is inflammation. Germs multiply there and if the mucous membrane of the nose and throat is inflamed, irritated or swollen, it is more likely to remain there and propagate, and if mechanical irritation of the mucous membrane would be sufficient by inhaling sharp particles of pumice or emery stone dust, then the sinus condition described in the cross-examination hypothetical question could be produced. He says sinus trouble would cause headache and active inflammation would give the patient temperature and headache and pus flowing into the nose and throat makes patients susceptible to colds and people who have colds regularly and continually are more susceptible to sinus trouble.

Doctor Louis Ford, eye, ear, nose and throat specialist; Dr. F. N. Cloyd, who had had little experience in sinus trouble; Dr. O. E. Fink, eye, ear, nose and throat specialist, and Dr. Crispin, the company doctor and general practitioner, in answer to hypothetical questions which omitted material facts, as claimed by appellee, gave their opinions that the sinus trouble could not be caused from the conditions described in the direct hypothetical question submitted, but all admit it is a germ disease and any irritation of the mucous membrane or other membrane of the nasal passages, which would form a more fertile field for bacteria producing sinus to infest and propagate and cause sinus trouble and it in turn, causes the other troubles we have mentioned—loss of hearing, headache, nose bleed, bad eyes and inability to sleep.

Appellant pleaded the general issue, there was a trial by jury and verdict and judgment for appellee.

The action in this case is predicated upon section one of the Act to Protect Employees from Occupational Diseases and reads as follows: "That every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employes to the danger of illness or disease incident to such work or process, to which employes are not ordinarily exposed in other lines of employment, shall, for the protection of all employes engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." Sec. 73 chap. 48, Smith-Hurd Rev. Stat. 1929.

It is contended by appellant that the disease contracted by appellee was not an occupational disease for which a recovery

could be had under said section one and that the second count in the declaration partakes of a charge, under said section one, and that a recovery could be had under the second count as well under section twelve of the Health Statute, par. 154, chap. 48, page 1274, Cahill's Ill. Stat. 1929, which reads: "and all dust of a character injurious to the health of the persons employed, which is created in the course of a manufacturing process, within such factory, mill or workshop, shall be removed, as far as practicable, by either ventilating or exhaust devices." And also under the statute pertaining to blowers upon metal polishing machinery, paragraphs 133 to 136, chap. 48, page 1271, Cahill's Ill. Stat. 1929, which requires factories using emery wheels or emery belts to provide blowers or similar apparatus to protect the persons using the same from the particles of dust arising therefrom, and that in either case a common law action would arise in which no element of wilful negligence would obtain and to which, without question, as contended by appellant, the doctrine of contributory negligence would apply.

Upon the trial in the court below the court refused to submit to the jury the question of appellee's contributory negligence, so that, if appellant's contention is correct, the judgment must be sustained under the first count in the declaration, if at all. Did the nature of appellee's employment subject appellee to the danger of illness or disease such as he suffered, and was such illness or disease incident to such work or processes to which employes are not ordinarily exposed in other lines of employment? For a better understanding of the case we submit some of the abstracted proofs. Dr. Jewell testified that from a medical standpoint, to a reasonable medical certainty, I have an opinion as to any connection between such kind of work on such

polishing machine and breathing of dust as has been described and the sinus trouble. The medical connection is the irritation set up by the dust which acts as a foreign body in this case, setting up inflammation and inflammation becomes a point for infection. Loss of hearing would follow on irritation and inflammation of the sinus as spoken of and frequent nose bleedings of one so employed; also repeated or continuous headaches of one so employed and inability of one to sleep. I stated that along before December, 1928, the condition had cleared up to some extent at the time he went back to work; that later I examined him and there was cloudiness or something there on later examination. In my opinion as a medical man, the fact that in my opinion it practically cleared up about December, 1928, and then when I examined him after that it had the condition I testified to, cloudiness or whatever you call it, was because you might say it was a relivening up of the old condition. Very often these conditions clear up but there is a small amount of infection left, or even though the infection is cleared up, there is an irritation, that is, the parts that were infected are more easily affected than normally. In my opinion, the condition at the present is perhaps a continuation of the condition which I first observed when I first examined him. That is my opinion as a medical man. As to the number of different causes of trouble in the sinus I would have to name them and count them at the same time. I couldn't say but there are probably eight or ten accepted causes. It is even caused by cold. This matter of trouble in a sinus might be peculiar to any work where there is a great quantity of dust or dirt. With that particular employment I wouldn't think that it is incident to and peculiar with the employment, except as he was in dust, and the dust is the thing that would make it peculiar or make it caused, and hence not be peculiar to the particular work with which the person is engaged. I don't mean to be understood

here as saying that either that was caused by this dust or that this dust or condition under which he worked was the peculiar cause leading to sinus infection, including various other causes. It would be one of a list of causes of sinus trouble.

I have not examined any other person that has worked under these conditions for nose trouble, sinus trouble or ear trouble at that particular line of work, although I have where they worked in dust but not in this particular work we have before us now. This is my first case growing out of a condition of this kind.

This trouble that has been described here in the nose is not entirely a germ trouble or germ infection. There is one form of what we call irritation that is not necessarily an infection, although if the irritation lasts very long infection generally sets in. I couldn't fix the time, no certain time in which that takes place. There is no way of determining about that. Medical men can't very well fix a probable time with that sort of thing. It is a fact that the best medical authorities class sinus trouble as a germ disease.

I couldn't say yes or no as to whether there is more probability or likelihood of this pumice stone dust and emery dust causing sinus trouble than various other causes that might lead to it, because, as I said before, it is only one of the causes in a list of causes, and the likelihood would depend upon the exposure.

Dr. Baumgard testified that there are a great many things that cause an infection of the maxillary sinus, such as irritation and ordinary colds. I am referring to mechanical irritation of the mucous membrane of the nose, the lining of the sinuses. The sinus is connected with the nose. It is connected rather by an opening, passageway. An irritation of the nose as I have described might cause sinus infection of the maxillary sinus because the lining of the nose, the inside of the nose, is continuous of the

lining of the inside of the sinus and your infection will travel along the tissue by continuity of the tissue, Sinus infection must be a germ disease.

Any irritation, especially if it is consistent, anywhere devitalizes and congests the mucous membrane and causes it to have less resistance in that tissue and, of course, with the tissues more or less devitalized or congested why the more subject to an infection in a tissue of that kind than the ordinary healthy tissue.

As to the hearing of a person and such irritation, you have your mucous membrane that enters the respiratory tract and if it is inflamed there, that inflammation closes up, shuts off, more or less, the Eustachian tube, which connects with the ear at the nose and disturbs the equilibrium of the ear. That causes debility in the hearing by the irritation inflaming the opening into the Eustachian tube and closing it up. The breathing of such kind of dust during that period, could, in my opinion, cause such sinus infection. The emery dust or pumice stone dust itself is not an infection, but your emery dust and your pumice stone dust is an irritant and it is a substance that doesn't itself cause an infection but it acts as an irritant to the mucous membrane of the nose as it is breathed in and cakes on as a foreign body on this mucous membrane and causes a congestion and irritation. Whenever you have a lot of congestion or irritation of the mucous membrane it invites infection in time; it makes a fertile field for infection to take hold and in that way causes an infection.

A constant or periodic headache is one of the symptoms of sinus infection. Breathing of dust is not sufficient to produce a loss of hearing, but it causes your irritation and your infection afterwards and closes up the Eustachian tube and causes impairment of hearing due to your infection on top of your irritation.

The condition I described as having found would interfere in the future in my opinion as to the ability of Robert Marion to perform ordinary manual labor, as he has at the present time an inflammation of the lining of the nose that we assume is caused by an irritant like emery or pumice stone, and he has a chronic maxillary infection, and if he got to work in any irritating dust—perhaps any kind of dust—breathed a lot of dust, it would just light up his old trouble again in my opinion.

The most common causes of sinus trouble are the ordinary respiratory infections that a man may get anywhere. I don't treat sinus troubles particularly. I am not a specialist in that line.

Whether I would advise a man to quit work if he had sinus trouble would depend on how sick he was. It would depend on how much discomfort it would give him. There are a lot of men working on various things that have sinus trouble. A lot of laborers have sinus trouble, possibly. Farmers and business men have it.

I think I would call it peculiar or incident to the work in which this boy was engaged on account of his breathing this very irritating dust, emery and pumice, neither one of which are absorbed or softened and would directly cause an infection of the mucous membrane if they were breathed. The probability is that it was caused that way.

So far as being peculiar to that occupation and peculiar with it almost to the exclusion of other causes, I would say that different men might follow the same occupation—it may not affect them alike, but a man working in an irritating dust cannot help but pay the penalty, obviously; depends on how long he works there. As to whether this is true as to some lines of work where there is no dust would depend on what their exposure is. I presume there is other work in which there is no dust from which men get inflammation and may have sinus trouble. They may get it where they aren't working at anything.

Climate has nothing to do with sinus trouble to my knowledge. As to whether it is a fact that in Illinois and through this latitude there is more sinus trouble and nasal trouble and throat troubles and ear troubles than there are in some other parts of the country, it was at one time assumed to be a fact, but I don't think it was well established. There are some places where they used to send us to get well, but they have sinus trouble in practically all over the United States so far as I know. I am not an authority on that. I don't think it is worse in some states than others and particularly in this latitude. I know that patients with nasal trouble, sinus trouble, throat troubles, are sent to Southern California, New Mexico and Arizona, but whether they actually benefit by it that's another thing I can't testify to. I don't know about that. As to dusty regions, I have never been any place except Southern California. I can't say that I saw lots of dust in Southern California. It is very dusty. It is a sandy country. I don't think there is as much dust as here except in certain seasons when it is dry. I know that patients are sent into these territories for these various illnesses. I don't have any idea how they come out. I don't know what happens after that; I don't send any there.

The following addition to the previous hypothetical question was inserted: that after this boy went to work at this machine and say about two or three weeks later that he had nose bleed and he had swelling in his face, both sides of his nose, bloodshot eyes and some bleeding at the nose and that he never had any of these troubles before, do you think it is likely in that time that he would take a chronic case of sinus trouble,

He wouldn't have a chronic case then, he would have an acute case. Whether that would yield to treatment, would be overcome by treatment, is always problematical. We would hope that if it

was an acute case treatment would overcome it. We would expect it. The maxillary infection is always a problem even if he quit work. It is always a questionable thing as to yielding to treatment for any sinus infection. My medical opinion would be that I would probably assume that it would clear up under treatment. Outside of any history of a case which came to me, involving the difficulty, I wouldn't know what caused it when I examined the patient.

When I referred to Mr. Meeks' question that an irritating dust would cause sinus trouble, I meant such dust as emery or pumice that we are talking about. Sinus trouble is a respiratory infection. A respiratory infection is any infection that affects the portions of the body that air goes through. Sinus trouble is a disease where the infection would almost, I think, necessarily come through the nose.

Dr. Allison testified that the sinus infection from a medical standpoint comes from just one thing and that when there is an infection in the nasal passages. By nasal passages I mean nose and post-nasal. As to the causes of sinus infection as I look at it, there is just one cause. That is infection in the nose. Just in general, there is infection in the nose, that's the first cause, extending to the sinus. There can be a number of causes of infection of the nose.

Some of the commonest things we have amongst us are the colds that we have in this climate or anything which would inflame the nasal membrane, irritating fumes, dust, hard cutting dust like sand or silica, granite dust or emery, pumice stone, things of that nature. Any of those things will irritate the nasal mucous membrane. I didn't answer the question quite correctly. Those things I mentioned there don't directly cause that sinus trouble but they do cause an irritation of the mucous membrane or an irritation of the mucous membrane lying in the nasal cavity or

along there. An irritated condition of the nasal mucous membrane in turn allows bacteria to collect there and further infection. Whether it is dust, cold or fumes, it always has much resistance in the nasal membrane but it makes the nasal mucous membrane so it doesn't have its normal resistance therefore, it becomes infected from the germs which are in the air, the germs which are in the nose all the time.

I have an opinion as to the breathing of such dust, the pumice stone dust and emery dust for a period of say two or three months at an average of nine hours per day on an average of about six days per week, as whether it would cause an inflammation or irritation such as I have described of the nasal cavity and posterior part of the mouth. Such breathing of such dust could cause such irritated condition as I have described, which causes at times sinus trouble. The same irritation as I have described could affect the Eustachian tube as I have described it. The infection of this Eustachian tube—not the Eustachian tube itself, it probably being closed up there—but the infection extending up to that Eustachian tube out into the middle ear, would be the thing that caused the most trouble there.

From a medical and surgical standpoint, to a reasonable certainty, the breathing of such dust as pumice stone dust and emery dust for a long period of time could or would cause an inflamed condition, which would result in a bacteria forming and which would cause an injury to the auditory organ, the ear, which would interfere with hearing. I would say a period of two or three months would be a long period of time. I don't think breathing that for one day would do it. It might possibly but I don't think so. The breathing of such dust from the last of June until the 25th of October on an average of about nine hours per day, six days a week, would be about four months. That would be long enough to produce irritation there.

In **Jannusch v. Weber Bros. Metal Works**, 249 Ill. App. 1, plaintiff appellee was employed in defendant's metal spinning establishment, where in the work and process of polishing and buffing, in which he was engaged, he contracted pulmonary tuberculosis. He worked as a spinner for a year or a little more and during that time he sometimes used an emery cloth and his work was similar to appellee's in this case.

“ ‘There was dust created by that process, enough to get our clothes full. You could see it in the air and you could see it on your clothes. It would not exactly get into your clothes, but it would be spread out in the air by flying around in the air. My face was about eighteen inches away from the object. Some of the dust would fly upward and some downward. We wore shop coats and I noticed some on the caps and I noticed dust around on the floor. The floor right by the lathe was swept up after we got through with each job.’

“Medical testimony was introduced to the effect that tuberculosis was one of the most widespread diseases known and is found in almost all parts of the civilized world; that it is an infectious disease and that it is usually transmitted by direct contact, drinking milk or by taking in other food which happens to have the germ in it, such as butter, cheese and tubercular meat, or in inhaling air which has the tubercular germ. About 10 per cent of all deaths in cities are brought about by tuberculosis. In practically everyone some tuberculosis development is found. Tuberculosis is not hereditary, strictly speaking. Tuberculosis is a disease produced when the body is invaded by a germ known as the tubercle bacillus. In dwellers in cities micro-organism is practically present in 90 per cent, at least, of adults, but it is not active. It is active in only a relatively small proportion of the population.

"The evidence shows that tuberculosis is not an illness which is exclusively caused by conditions such as those under which plaintiff worked, but we think the evidence does establish that the disease of tuberculosis is an illness to which employees in the kind of work plaintiff was doing are peculiarly liable. We also think that the evidence indicates that it is a disease to which employees would not be ordinarily exposed in other lines of employment, and we therefore conclude that the disease is within the definition of those to which the statute in question applies, and that plaintiff became infected therewith in the course of his employment with defendant."

Other questions of fact were raised in **Jannusch v. Weber Bros. Metal Works**, *supra*, as to the sufficiency of the machines used to protect the employees, but it is sufficient to say that the court sustained the judgment and the Supreme Court denied the petition for certiorari, which makes it the law of this State. Every argument made in the case at bar was pressed in the Jannusch case and the court said: "The act must be given a reasonable construction which will tend to effect the purpose which was in the mind of the Legislature when it was passed." The testimony showed that the injury was permanent and we are not prepared to say the verdict was excessive.

Finding no error in the record, the judgment of the Circuit Court of Vermilion County is affirmed.

Affirmed.

Abstract

Opinion Jan 26 - 1931

12

17

260 I.A. 635¹

General No. 8478

Agenda No. 34

October Term, 1930

CORBETT JEWELRY CO., a Corporation, Appellee,
vs.

BENJAMIN E. PATTON, Appellant.

Appeal from the Circuit Court of Sangamon County.
SHURTLEFF, P. J.

The Corbett Jewelry Company, appellee, was incorporated in October, 1928. Prior to that time Earl F. Corbett operated the jewelry store and was the sole owner. Benjamin E. Patton, appellant, was employed as an auditor for said store in 1924 and continued to work as an auditor at a salary of twenty-five dollars a month until in March, 1928, when his salary was increased to forty-five dollars a month. He was to continue as auditor, was to sign all checks and pay all creditors. Between January 1, 1929, and December 7, 1929, appellant kept the canceled checks and the check stubs in his private possession and they were never shown to the president or manager of appellee jewelry company. On December 7, 1929, Mr. Corbett finally secured possession of the canceled checks from Mr. Patton.

The declaration in this case consisted of the common counts, alleged that appellant had overdrawn his salary and set forth the amount overdrawn each month above his salary of forty-five dollars a month between January 1, 1929, up to July 1, 1929. After July 1, 1929, appellant failed to make his monthly audit of the books of the corporation, but nevertheless drew checks on the corporation for his salary. Appellant was charged with this

as overdrawn salary from July 1 to December 1, 1929. Appellant purchased merchandise, amounting to sixty-six dollars, which he failed to pay, making a total for merchandise purchased and overdrawn salary of \$1021.

The question in dispute which was tried before a jury was as follows: Was appellant's salary increased from forty-five dollars to forty-five dollars plus five dollars a week in August, 1928, and later increased to twenty-five dollars a week in March, 1929, as contended by appellant; or did his salary remain forty-five dollars a month after March, 1928, as contended by appellee? If the contention of appellee was correct, according to the canceled checks introduced as exhibits appellant had overdrawn \$955 and owed the store sixty-six dollars for merchandise, making a total of \$1021. If the contention of appellant was correct, and his salary had been increased as he contended, he would owe the store only sixty-six dollars for merchandise purchased.

There was a trial by jury and a verdict and judgment in favor of appellee and against the appellant in the sum of \$621, and appellant has brought the record of the cause to this court, by appeal, for review.

We have read the testimony and examined the record. There are no errors in the acceptance or rejection of testimony or in the giving or refusal of instructions that would warrant a reversal of the judgment in this case. Nothing is involved in this appeal except an issue of fact. As we view the testimony, the jury could have found a verdict for either party upon the proofs, as they may have accorded credence to the various witnesses. We cannot say that the verdict is against the manifest weight of the testimony.

Appellant complains because on the theory of the case taken by the jury the verdict was not for a larger sum. In an action for a breach of contract, where the jury found there was a

contract but awarded a less sum than claimed, if the evidence is conflicting it will be upheld by the court. A defeated party cannot complain that a verdict was for less amount than the evidence of the successful party warranted. (**Central Trust Co. v. Kuglin**, 194 Ill. App. 294; **Kerman v. Advance Terra Cotta Co.**, 211 Ill. App. 316; **Janssen v. Janssen**, Gen. No. 7671, Third District Appellate Court of Ill.) The last case cited was a suit upon three notes for four thousand dollars and the verdict was for \$2,425. It was contended by appellant that the verdict was wrong because the verdict should have been larger and for the full amount or nothing. Judge J. Niehaus, in the opinion of the court, held as follows: "It is sufficient to point out in reference to this contention that appellant was not harmed by this error, and therefore is not in a position to raise any objection thereto."

Finding no error in the record that will warrant a reversal, the verdict and judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

abst.

Opinion Jan 26-1931

13

14

260 I.A. 635⁵

General No. 8452

Agenda No. 15

October Term, A. D. 1930

G. L. GARRETT, Administrator of the Estate of
Lula E. Garrett, deceased, Appellant,

vs.

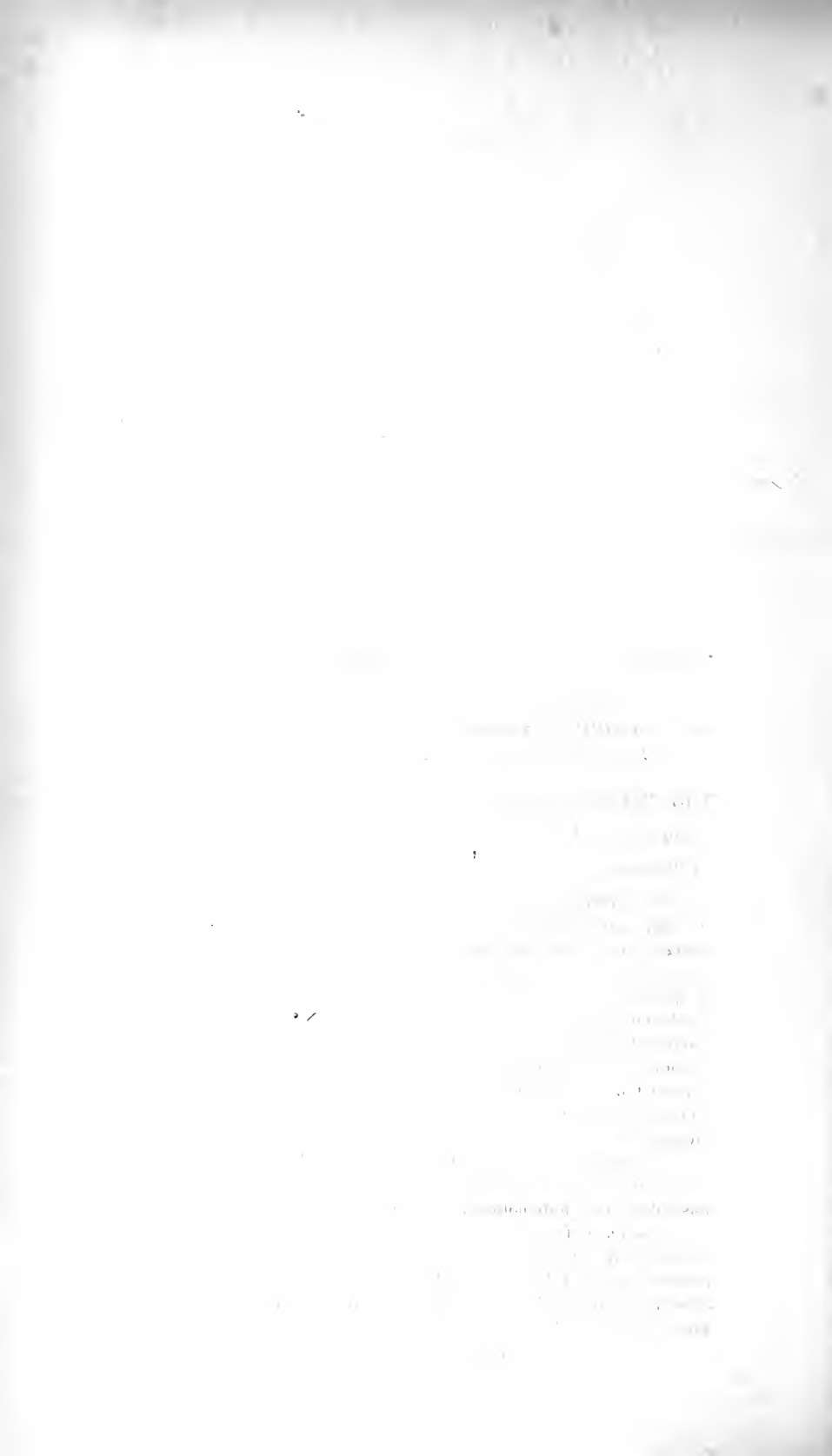
THE PENNSYLVANIA RAILROAD CO., Appellee.

Appeal from Circuit Court, Cumberland County.

ELDREDGE, J.

The declaration in this case is in trespass upon the case and consists of five counts. The suit was brought to recover damages for the death of the deceased caused by a collision between a train of cars of appellee and an automobile driven by the deceased. At the close of the evidence offered on behalf of appellant, the trial court, upon the motion of appellee, excluded the evidence and directed the jury to find a verdict of not guilty. Judgment for appellee was thereupon entered, to reverse which, this appeal is prosecuted.

The first count in substance charges general negligence in the operation of the train while deceased was riding in an automobile across said railroad while in the exercise of due care for her own safety. The second count charges negligence on the part of appellee in that no bell of at least thirty pounds' weight or steam whistle placed on said locomotive engine was rung or whistled at a distance



of at least eighty rods from said crossing and kept ringing or whistling until said crossing was reached by said train. The third count charges willful negligence in that with a conscious indifference to consequences appellee wilfully and wantonly drove said train approaching said crossing and wilfully and wantonly failed to ring a bell or blow the whistle at a distance of eighty rods from said crossing and continue to ring said bell or blow said whistle until said crossing was reached. The fourth count charges willfulness on the part of appellee in that with a conscious indifference to the consequences drove said train approaching said crossing and wilfully and wantonly failed to keep a sharp lookout for anyone crossing or about to cross the railroad tracks at the crossing. The fifth count also charges willfulness in that appellee wilfully and wantonly drove said train as it approached said crossing at an excessive or unreasonable rate of speed, to-wit, sixty miles per hour.

Woodbury is a small, unincorporated settlement located north of the railroad of appellee and northeast of the crossing. The tracks of appellee at this crossing run east and west. State highway known as route 11 parallels the railroad tracks at this point eighty-five feet north thereof. A dirt highway runs north and south crossing the railroad tracks and intersects route 11.

The accident happened where the dirt road crossed the railroad. Between twenty or twenty-five feet west of the dirt road and fifteen or twenty feet north of the tracks appellee maintained a small depot fourteen feet wide and eighteen feet long. On the right-of-way of appellee a quarter of a mile west of the crossing and about twenty feet north of the north or east bound track of the railroad were located a water tower, a pump house and a coal house. Two railroad tracks ran over this crossing, an east bound track and a west bound track.

On April 22, 1929, Viola Garrett, a daughter of the deceased, and Jerine Sheehan attended school at Jewet a town east of Woodbury. Mrs. Garrett, the deceased, drove in her automobile to Jewett to take her daughter and Miss Sheehan home from school. On the return, Mrs. Garrett sat in the front seat and drove the car while her daughter and Miss Sheehan sat in the back seat. She drove west on route 11 until she came to the dirt road when she turned south onto the dirt road and stopped her car about six feet south of the edge of the cement pavement where Miss Sheehan got out of the car to go to her home. In front of the car where it stopped to let Miss Sheehan out was a railroad sign with the word "Stop" on it. The point where Mrs. Garrett stopped her car on the dirt road was about eighty feet north

of the north rails of the east bound railroad track. After Miss Sheehan left the car, Mrs. Garrett drove the same south on the dirt road toward the railroad tracks. She did not stop the car again but drove directly on to the tracks across the north or west bound track and as she was attempting to cross the east bound track she was struck by the train coming from the west on the south or east bound track. The evidence conclusively shows that Mrs. Garrett was familiar with this crossing and that after she passed the line of the depot twenty feet north of the west bound track there was nothing to obstruct her view of the tracks in a westerly direction for a distance of at least a quarter of a mile. The south side of the depot was twenty feet north of the north track and all the witnesses testified that her car was not going to exceed four miles per hour. Going at this very low rate of speed after she had passed the line of the south side of the depot if she had but glanced to the west she could not have avoided seeing the approaching train in ample time to have stopped her car. In the case of **Greenwald v. B. & O. R. R. Co.**, 332 Ill. 627, it is held in substance that where a person must inevitably have seen the danger, if he had looked, and there are no circumstances or conditions which excuse looking, a failure to look is contributory negligence as a matter of law and justifies the direction



of a verdict of not guilty. While the evidence tended to show that no whistle was blown and no bell was rung on the train the presumption that others will not be negligent will not excuse one from the consequences of a failure to exercise ordinary care in his own behalf. *Greenwald v. B. & O. R. R. Co.*, *supra*.

The contention that the injury received was caused by the wilful and wanton conduct of the servants of appellee can not be sustained. The mere failure to give the statutory signals on approaching the crossing will not of itself sustain the charge of wilfulness and wantonness. *Burns v. C. & A. R. R. Co.*, 229 Ill. App. 170. In the case of *Chicago City Ry. Co. v. Jordan*, 215 Ill. 390 it is held that in order to sustain the allegation of wilfulness or wantonness it is necessary to prove, "not negligence merely, of any degree, but such conduct as would show a general intent to inflict an injury." In the case of *Grinestaff v. N. Y. C. R. R. Co.*, 253 Ill. App. 589 it was held in substance that if the defendant had failed to blow the whistle or ring the bell or if it had run its train at too high a speed these facts alone would not have been sufficient to convict the railroad company of a wilful or wanton injury. The court further held, "To contend that failure to ring a bell or blow a whistle, even under the conditions stated with no



other attending circumstances, argues a wilful and wanton injury, is no more forceful than the contention that appellee's failure to stop, look and listen at the crossing argues a wilful and wanton purpose on the part of the appellee to derail the train."

The wilfullness charged in the fourth count is based upon the allegation that the servants of appellee wilfully and wantonly failed to keep a sharp lookout for anyone crossing or about to cross the railroad tracks. The court admitted, over objection, testimony to the effect that the engineer of the train testified at the coroner's inquest that he did not see the car and knew nothing about the collision until he heard the crash and that the fireman testified at that time that he stooped down about three hundred feet west of the crossing to put in a fire and saw nothing on the crossing and he was just returning to his seat box when he heard the crash. The admission of this evidence was incompetent as being but hearsay evidence. **M. C. R. R. Co. v. Gougar**, 55 Ill. 503; **C. & N. W. Ry. Co. v. Filmore**, 57 Ill. 265; **C. B. & Q. R. R. Co. v. Riddle**, 60 Ill. 534; **Baier v. Selke**, 211 Ill. 512. Moreover, no such duty was imposed upon appellee. **Satterlee v. C. & E. I. Ry. Co.**, 251 Ill. App. 625 and cases cited therein.

The wilfullness charged in the fifth count is that the train

was operated at a speed of sixty miles per hour. There is no statute fixing a maximum speed for railroad trains. As we said in the case of *Burns v. C. & A. R. R. Co.*, *supra*, "It has been held in a long line of cases that an averment in a declaration that the defendant wilfully and wantonly operated its train in excess of a speed limit does not state a cause of action." The speed of the train in this case was not in violation of any statute or ordinance. All the questions of law involved in this case have been repeatedly passed upon and settled in both the Supreme and Appellate Courts of this State adversely to the contentions of the appellant and the judgment of the Circuit Court is therefore affirmed.

abstract

Opinion Jan. 26-1931

14

A

260 I.A. 636

General No. 8458

Agenda No. 18

October Term, A. D. 1930

ARLENE RUGEL, a Minor, etc., Appellee
vs.

STEVE KUZNIK, Appellant.

Appeal from Circuit Court, Macoupin County

ELDRIDGE, J.

This action on the case was brought by appellee originally against appellant, Steve Kuznik, Jr. and Mary Kuznik for damages sustained by appellee by being bitten by a vicious dog belonging to appellant. When the case was called for trial the defendants made a motion for a continuance on the ground of the illness of Mary Kuznik. Thereupon the plaintiff dismissed the suit as to Mary Kuznik and Steve Kuznik, Jr. Thereupon Steve Kuznik, Sr., appellant, made a motion for a continuance supported by an affidavit setting forth that the dismissal made it necessary for him to procure other witnesses who were not present and who could not be procured to testify on the day set for hearing. This motion was also overruled. The affidavit as abstracted is as noted above, and there is nothing in it which could in any wise inform the Court who the witnesses were or what they would testify to if present and whether

such testimony would be material to the issues in the case, and it was not error to overrule the motion.

The case proceeded to a trial which resulted in a verdict awarding \$175.00 as damages, on which judgment was entered.

It is contended by appellant that the Court erred in refusing several instructions offered by him. The jury were fully informed by the instructions given as to the law of the case and there was no error in refusing to give the instructions offered. The evidence tends to support the verdict and the judgment is affirmed.

abstract

Opinion Jan 26 - 1930

15

17

200 I.A. 636²

General No. 8470

Agenda No. 27

October Term, A. D. 1930

ALMA WILLIAMS, Administratrix of the Estate of
CALVIN WILLIAMS, Deceased, Appellee,
vs.

SCHULZE BAKING COMPANY, Appellant.

Appeal from Circuit Court, Sangamon County.

ELDREDGE, J.

In an action on the case appellee recovered a judgment against appellant for the sum of \$10,000.00 as damages for the death of her intestate caused by a collision between a motor truck of appellant and the deceased who was riding a bicycle.

There was only one instruction given on the measure of damages and that was one offered by appellee and is as follows:—"The Court instructs the jury that if, from the evidence in the case and under the instructions of the Court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, then, to enable the jury to fix the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof."

The measure of damages in cases of this character is fixed by the statute as, "a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." This instruction does not limit the jury to the assessment of such pecuniary

damages which resulted from such death to the wife and next of kin of the deceased person but gives it free range to include in the damages other matters which might be shown by the facts in evidence as grief, sorrow, loss of companionship, etc. We have already passed upon an instruction of similar character in the case of **Crawford, Admx. v. Zachary**, 235 Ill. App. 122 where a full discussion of the sufficiency of such an instruction was had. No other errors of importance appear in the record.

The judgment of the Circuit Court is reversed and the cause remanded.

Abstract

Opinion Jan 26 1931

16

7

260 I.A. 636³

General No. 8473

Agenda No. 30

October Term, A. D. 1930

CLARENCE F. SPENCE, Minor, by FRANK R.
SPENCE, His Father and Next Friend, Appellee,

vs.

GEORGE C. MOSER, Appellant.

Appeal from Circuit Court, Sangamon County.

ELDREDGE, J.

Appellee recovered a judgment for the sum of \$4,000.00 in an action on the case for damages for injuries received by being struck by appellant's automobile through the negligence of the latter.

The first error presented for our consideration is the alleged misconduct of counsel for appellee in the selection of jurors by calling their attention to the fact that an insurance company was interested in the case. On the examination of the first two prospective jurors counsel for appellee asked each one whether he knew Archie Schryver and whether he knew Claude Barr. Each of these jurors answered these questions in the negative. After they had answered the questions counsel for appellant objected to the questions and stepped to the Judge's desk and out of the hearing of the jury renewed his objections. The Court inquired

as to the ground of the objections and thereupon counsel for appellant out of the hearing of the jury stated that both Schryver and Barr were insurance men, well known as such in the community and were connected with an insurance company in which the defendant had automobile insurance. Counsel for appellee then stated likewise out of the hearing of the jury that the purpose of said questions was only to enable plaintiff to intelligently exercise his right of peremptory challenge but the Court admonished counsel for appellee concerning said line of interrogation and sustained the objection of the defendant thereto. C. A. Woodward was the third juror to be examined and he voluntarily stated without being asked relative thereto that he knew Archie Schryver. Thereupon counsel for appellant again stepped to the Judge's desk and out of the hearing of the jury entered a motion that the setting of said cause be cancelled and that the same be continued to some future date when a jury could be selected who had not heard said questions. The Court overruled this motion but stated out of the hearing of the jury that the juror Woodward might be excused by the defendant if he so desired without a peremptory challenge, and the said juror was so excused. Counsel for appellant contend that the two insurance agents mentioned were widely known in the community and that

the questions asked of the jurors had the effect of informing the other prospective jurors on the panel that the defendant carried insurance in the company represented by them. We can see no basis for this contention whatever.

The next error urged in regard to the misconduct of counsel for appellee on the trial is based upon a mistaken statement of facts as clearly shown by the bill of exceptions in the record. Counsel for appellant objected to certain questions propounded to appellee in regard to his occupation. Counsel for appellee then said: "I was going to show by this witness—we are claiming for loss of wages, and that the father is bringing the suit as next friend, and that is a recognition of his right—we will also follow this up by showing that he was collecting, using and spending his own money during all of this time." The Court thereupon said:—"You better get the jury out of here." Thereupon counsel stated:—"I am stating our position. I am not trying to get the jury to hear this." Thereupon the jury left the Court room and the argument on the admission of the evidence proceeded out of the hearing of the jury. The complaint made by counsel for appellant is that counsel for appellee said: "I am trying to get the jury to hear this." The record shows he made no such statement.

In regard to the merits of the case much of the argument of counsel for appellant is based upon another misconception of the facts as they appear in the record. In his argument he states:—"In his examination in chief appellee testified: 'I was at that time attempting to cross Monroe Street,'" Appellee in fact

testified as shown by the bill of exceptions as follows:

“Q Were you at that time attempting to cross Monroe Street?

A I was not.

Q Were you intending then to cross Monroe Street?

A No, sir.”

In substance the evidence shows that on the evening when the accident occurred appellee intended to meet his parents at the Recreation billiard room located on the north side of Monroe Street and between Fifth and Sixth Streets in the City of Springfield, at 8:30 o'clock. He was standing on the sidewalk watching for them and saw them on the opposite side of the street. He stepped off the sidewalk onto the street between the parked cars along the side thereof and waved to his folks in an attempt to attract their attention to where he was. He stood just outside the yellow line behind the parked cars. About this time a street car had crossed Sixth Street and was approaching the place where he stood. Behind the street car and trailing it was the automobile driven by appellant. As the street car approached in the direction where appellee was standing appellant swerved out to the left for the purpose of passing the street car on the left side thereof and in doing so the handle on the left door of his automobile struck appellee in the face causing severe injuries. The evidence introduced on behalf of appellee tends to prove that appellant passed the street car at a

speed of from 30 to 35 miles an hour. Appellant testified that he was driving between 12 and 15 miles per hour. No witness testified that appellee was moving across the street when he was struck. Appellant testified: "I saw Mr. Spence just about a third of a second before he came in contact with my car, but there was no room or you couldn't act at the time I seen him until he hit my handles."⁴ Whether appellant was guilty of negligence and whether appellee was guilty of contributory negligence were questions of fact for the jury to determine.

It is urged that the Court erred in refusing to give certain instructions offered on behalf of appellant. The Court gave 13 of the 31 instructions offered by appellant and the jury were fully informed by the instructions given of all the necessary propositions of law applicable to defendant's rights under the pleadings and the evidence. The principles of law involved in some of the instructions were contained in others which were given and appellant's rights were fully guarded by those given on his behalf.

There is no reversible error in the case and the judgment is affirmed.

Abstract

Opinion Jan 26 - 1931

177

260 I.A. 636⁴

General No. 8489

Agenda No. 45

October Term, A. D. 1930

CHARLES H. WERNER, Appellant,

vs.

HENRY FRAASE and EDWARD FRAASE,

Appellees.

Appeal from Circuit Court, Sangamon County.

ELDREDGE, J.

Appellant owned the S.E. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$, Sec. 33, Township 16 North, Range 6, west of the Third P. M. in Sangamon County. He was bounded on the north and west by lands owned by appellees. By an agreement of long standing appellant owned and controlled the north half of the division fence on the west of his land and appellees owned and controlled the south half of said division fence. Appellees' half of this division fence was constructed of wire while appellant's half consisted of hedge.

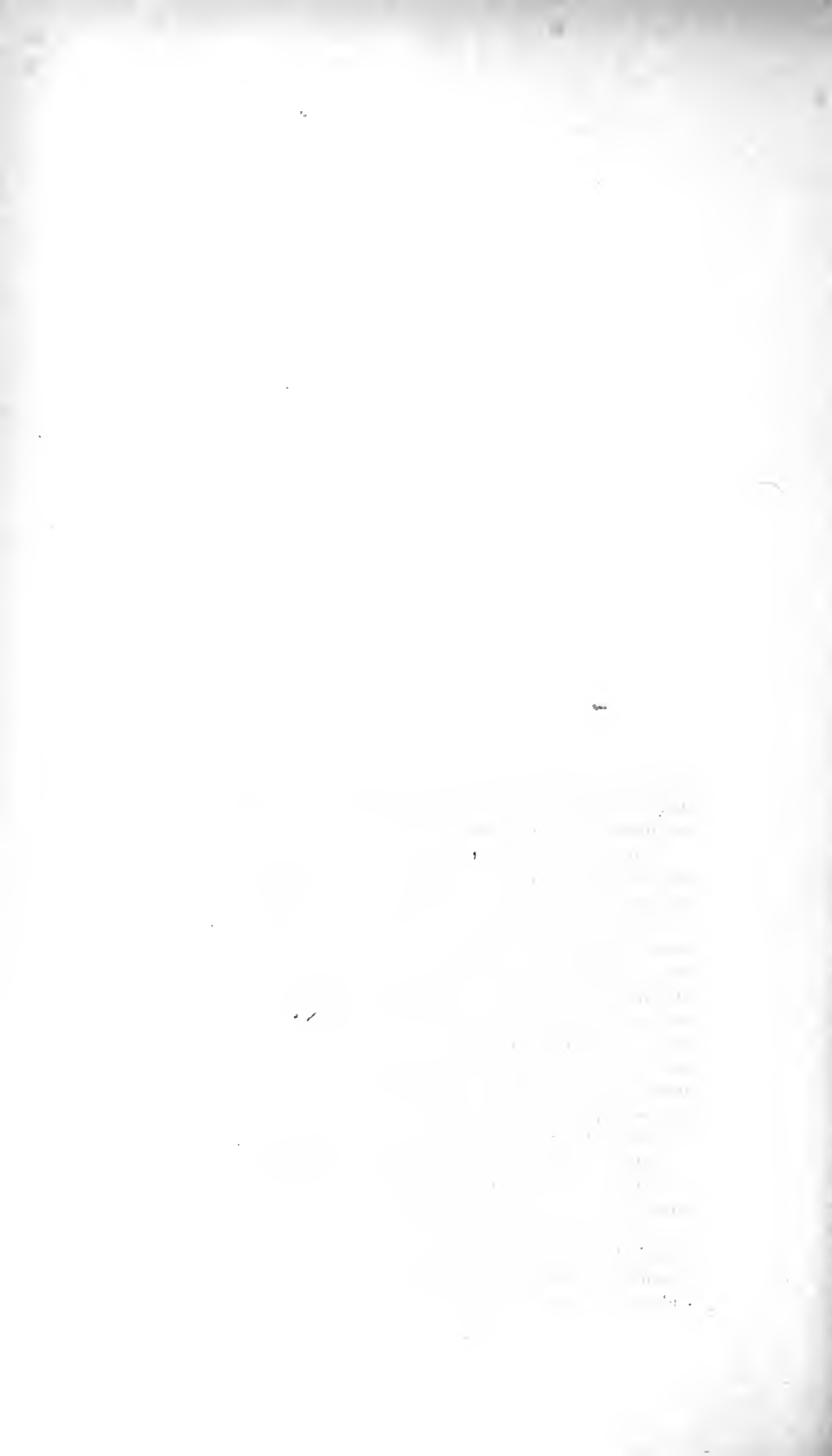
On the north of appellant's land, by the same agreement, appellees owned and controlled the west half of the fence and appellant owned and controlled the east half thereof. Commencing at the west end of appellees' half of this division fence and running east the fence consisted of a very high hedge which appellees claim they permitted to grow as a windbreak. The

THE
JOURNAL
OF
THE
ROYAL ANTHROPOLOGICAL INSTITUTE
VOLUME 10
PART 1
1880
LONDON
PUBLISHED BY THE
Royal Society
11, BEDFORD SQUARE, W.C.
1880

remaining portion of appellee's fence consisted of hedge. The east half of this fence owned by appellant was partly hedge and partly wire.

Appellees served notice on appellant to trim the latter's hedge on the west side of appellant's land and also to trim his hedge on the north side of his land to a height of less than five feet in accordance with the statute. Appellant having failed to comply with said notice appellees trimmed appellant's hedge on the west side of the latter's land whereupon appellant filed a bill to restrain appellees from trimming appellant's hedge on the north side of his land and to assess damages for the trimming of his hedge on the west side of his land in consequence of throwing the brush therefrom on appellant's land thereby destroying a fraction of an acre of alfalfa which had been planted thereon.

Appellees filed a cross bill asking that appellant be decreed to pay appellees for the cost of trimming the latter's hedge on the west side of his land. The issues were completed by the filing of answers to the bill and cross bill and replications thereto. The cause was referred to the Master in Chancery who heard the proofs and found that appellees were justified in trim-



ming the hedge on the west side of appellant's land but not justified in trimming the hedge on the north side of the land because they themselves had failed to comply with the statute in keeping the hedge trimmed on their portion of the north division fence and also found that the cost of trimming appellant's hedge on the west side of his land was \$40.00. The Chancellor overruled the exceptions to the Master's report and entered a decree finding that the fences on the west and north sides of appellant's land were separate and distinct division fences and that appellees were justified in trimming the west division fence and fixed the cost thereof at \$40.00 but enjoined appellees from attempting to trim the north division fence on the ground that they themselves had not complied with the law in regard to their own portion of that fence by keeping the same to a height of less than five feet in accordance with the statute.

Appellant's contention is that the west division fence and the north division fence comprised one division fence and that appellees were not justified in trimming the west division fence because they were in default in not keeping their portion of the north division fence trimmed. To this we cannot agree. These fences ran in different directions, were entirely separate and

distinct except where they joined at the northwest corner of appellant's land. The parties themselves recognized this because their respective portions of the two fences did not join as appellant's hedge comprising the north half of the west division fence joined the west half of the north division fence comprising appellees' half thereof.

Appellees contend the Chancellor erred in holding them in default as to their portion of the north division fence because the tall hedge which they permitted to stand without trimming was in fact a windbreak which was therefore exempted under the statute. It is conceded that there was no orchard nor buildings anywhere within the vicinity of this hedge that was on the south line and the evidence sustains the finding that it was not used and had not been used for such purpose.

It is provided in the decree that each party shall pay one-half of the costs. Both parties object to this order. In our opinion this provision of the decree was proper.

The evidence sustains the findings of the Master and the decree, and the decree is therefore affirmed.

Opinion - January 26, 1931.

18

17

260 I.A. 637¹

General No. 8448

Agenda No. 11

October Term, 1930

LOLA B. SWETMAN, Plaintiff in Error.

vs.

MARY H. ARNOLD, Defendant in Error.

Error to Sangamon County Court.

NIEHAUS, J.

The plaintiff in error Lola B. Swetman, a real estate broker brought this suit against Mary H. Arnold, the defendant in error, to recover the sum of \$200.00 which she claimed was due her under a contract with the defendant in error, for the sale of real estate situated in the city of Springfield. The case was tried in the county court of Sangamon County on appeal from a justice of the peace; and the jury found a verdict in favor of the defendant in error. The plaintiff in error made a motion for a new trial, which the court denied, and thereupon rendered judgment in bar against the plaintiff in error's right of action. This appeal is prosecuted from the judgment rendered.

It is contended by the plaintiff in error, that she had a contract with the defendant in error, authorizing her to sell the property in question upon certain terms, and that she procured a purchaser by the name of C. W. Jones, who was ready, able and willing to purchase the property upon the terms agreed upon between the plaintiff in error and the defendant in error, but that the defendant in error refused to sell the property

upon those terms; and that afterwards she sold the same to the purchaser mentioned upon different terms; and that therefore under her contract she is entitled to the commission agreed upon.

The evidence in the record shows, that the terms of sale under which the plaintiff in error was authorized to sell the property was a controverted question on the trial; and another controverted question was, whether the plaintiff in error procured the purchaser to whom the defendant in error finally sold the property. Concerning her alleged contract for the sale of the property, the plaintiff in error testified as follows: "I had no written contract, just a verbal one, I had a contract with Mrs. Arnold to sell this property at her home and at my home over the telephone." She also testified: "I had an arrangement with Mrs. Arnold to sell her property, and I worked on her property quite a while, a year or more, but she had the price too high, nobody would buy it. Finally she came down to \$4200.00. If she could not get the forty-two hundred dollars she would take what she could get, provided she had an equity in the property of \$1000.00". She testified concerning the matter of procuring the purchaser: "Mr. Edgar Giles, a street car conductor, told me about Mr. Jones on the first day of April, 1930, and I went right out there on the first day of April in the evening, along about five or six o'clock.* * *

I never heard of Mr. Jones before Mr.

Giles told me where he lived. * * * That evening I called Mrs. Arnold over the phone and she was going to accept \$3750.00. I talked to Mrs. Arnold over one phone, and I called Mr. Jones over the other phone. He said I will give her thirty-eight hundred provided I could see the room. She said she would clean the room up and let him see it the next morning. The next morning we went to see that room, that is Mr. Jones, Mrs. Jones and myself. * * * This was the third day of April 1930. They saw the room and saw that it was all right. They said they would go down to the bank, that they had all the arrangements made for a loan on their property. * * * I sold the property fair and square on the third day of April, 1930, for \$3800.00; and that would give her \$1000.00 after everything was paid, her equity out of the place."

Mr. Jones, the purchaser testified that he bought the property on the seventh day of April from Mrs. Anderson and Mr. Fleming; and entered into a contract for it at that time. He also testified, that Mrs. Anderson showed him the property some time in November 1929, and that he saw it two different times, once in November, and once in February previous to the time of his negotiations with the plaintiff in error in April 1930. That he bought it for \$4000.00.

Concerning the matters in dispute, defendant in error

testified: I thought if I could sell my property before the third day of April 1930 I would sell it and not renew my mortgage. I owed \$2500.00 on it, to the First National Bank. * * * Mrs. Swetman had not had my property for sale very long, only a few days. * * * One day Mrs. Swetman was at my house and Mrs. Gus Anderson dropped in. She was a real estate woman. Mrs. Anderson said to me, you think you would not take that trade. I thought you might consider taking it in. I said, no, Mrs. Anderson, nothing but the cash. I said this way, 'if they pay me the difference between the \$2500.00, which the Bank has on my place, the First National Bank, then they can pay me the rest, which would be I said, \$1600.00. I said if they wanted to assume the mortgage it does not make any difference. She said all right, Mrs. Arnold, I think I can make the deal. I will see Mr. Jones again and see what I can do.' * * *

With reference to her contract with the plaintiff in error, the defendant in error testified as follows: "Mrs. Swetman and Mrs. Childers had my place for sale. Mrs. Anderson had it. None of them had a written contract. If they sold it, they were to get paid. They were to sell it for \$4500.00. If they could not get \$4500.00 to come down to \$4200.00. * * * I told none of them to sell for less than \$4200.00; that was the least I would take. * * * I never had any conversation with

Mrs. Swetman to get me a \$1000.00 equity. No sir, I never did. * * * * Mrs. Swetman brought Mr. Jones out to my place on the first day of April. On the second day of April she brought him back again. She says, how much will you come down on the property, I said, I won't come down any. She said, If you will come down some, I will come down \$25.00 on my commission. I said no. They left the house."

The foregoing evidence tends to show, that the plaintiff in error did not procure the purchaser who finally bought the property; but that at the time when plaintiff in error began her negotiations with him, he had already negotiated with Mrs. Anderson for the purchase of the property and had made an offer for the property; and in payment therefor to trade his own property, which offer the defendant in error refused to accept; and that the negotiations by the plaintiff in error to sell him the property followed the refusal of the defendant in error to accept the offer; and the final negotiations which resulted in the sale of the property to Mr. Jones were therefore had by Mrs. Anderson and Mr. Fleming. Under these circumstances, the jury were warranted in finding that the plaintiff in error was not the one who had procured the purchaser for the property; and under the instructions from the court given for the plaintiff

to return a verdict finding against the plaintiff in error's claim.

We find no reversible error in the instructions given, both for the plaintiff in error and the defendant in error. They embodied substantially correct statements of the law pertaining to the case. For the reasons stated, the judgment is affirmed.

Judgment Affirmed.

1. The first part of the report is a general
description of the project and its objectives.
2. The second part is a detailed description of the
methodology used in the study.
3. The third part is a description of the results
of the study.
4. The fourth part is a discussion of the results
and their implications.
5. The fifth part is a conclusion and a list of
references.

Abstract

Opinion Jan 26-1931

1917

260 I.A. 637²

General No. 8487

Agenda No. 43

October Term, A. D. 1930

Mt. Pulaski Auto Company, Inc. Appellant

vs.

Cordia Starr, Appellee.

Appeal from County Court, Logan County.

NIEHAUS, J.

The record in this case discloses that the appellee Cordia Starr purchased a Dort roadster automobile from the appellant Mt. Pulaski Auto Company, for the sum of \$750.00, on July 9, 1922; and in payment therefor gave a judgment note on that day for the amount of the purchase price. The appellant took judgment on the note referred to on the 17th day of August 1929 in the county court of Logan County. Thereafter on motion of the appellee the judgment was opened and leave was given to him to plead in defense; and thereafter the appellee filed three special pleas; in the first plea he averred that he paid to the appellant and that the appellant accepted from him, a certain Dort roadster automobile of the value of the amount of said promissory note; and that the appellant accepted the same in full satisfaction of the note and discharge thereof. The defense in the second and third pleas, is based on the averment therein, that appellee purchased the automobile in question upon the express condition, that the father of the appellee would approve of such purchase; and then and there signed and delivered

the promissory note in question to evidence the purchase price; that the father of the appellee disapproved of his purchase; and that thereupon he returned the automobile to the appellant; and that the appellant; received and accepted the automobile as a discharge of the indebtedness represented by the note.

The trial of the case resulted in a verdict of the jury finding the issues in favor of the appellee; whereupon the court rendered judgment in bar of the action. This appeal is prosecuted from the judgment.

The principle error assigned and argued is, that the verdict is manifestly against the weight of the evidence. It was incumbent upon the appellee to prove the defense set up in the pleas by a preponderance of the evidence. It is clear, from the evidence however, that a preponderance of the evidence tends to show, that he did not purchase the automobile in question on condition mentioned in his pleas, that his father would approve the sale. The evidence also tends to show, that the automobile was not returned to the appellant in payment and discharge of the amount due on the note; nor that the appellant accepted it in discharge of the indebtedness represented by the note. The verdict is therefore manifestly against the weight of the evidence.

The judgment is therefore reversed and the cause remanded.

The first part of the report is a general statement of the facts of the case. It is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The second part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The third part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The fourth part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The fifth part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The sixth part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

The seventh part of the report is a statement of the facts as they are, without any attempt to explain or justify them. It is a statement of the facts as they are, without any attempt to explain or justify them.

JAN 19 1931

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

Robert B. Noel
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS.

OCTOBER TERM, A. D. 1930.

TERM NO. 15.

AG. NO. 25

260 I.A. 637³

CLYDE SPENCER, et al,	:	
Appellees,	:	APPEAL FROM
	:	
V.	:	ALTON CITY
	:	
ALTON RAILWAY COMPANY,	:	COURT.
Appellant.	:	

BARRY, P. J. - Appellees recovered a verdict and judgment for damages to their car alleged to have been caused by the negligence of appellant. The collision occurred on January 16, 1929. On the day in question the pavements were covered with ice and it was raining and sleeting. The driver of appellees car said that it was necessary to stop about every three blocks and scrape the ice off the windshield with scissors and that she had done this when she was four blocks from the point of collision.

Washington street runs north and south and is crossed at right angles by College Avenue. Appellant's car was going south on Washington street and stopped at the north side of the intersection to receive or discharge passengers. Appellees car was going east on College Avenue. The driver of appellees car says that she saw the street car standing still when she was a half block west of the street car track. She says that she slowed up some and didn't see the street car when it started forward. She says that as she approached the street car track she looked both ways and that when she again looked at the street car she was about twenty feet from the west rail and that

the car was then standing still; that she then looked to the right and after doing so again looked for the street car and it was right on her. She says she was going eight or ten miles an hour just before and at the time of the collision.

The great weight of the evidence is to the effect that the driver of appellees car approached the intersection at a speed of thirty or thirty-five miles per hour without stopping or slackening her speed. The evidence shows that the street car was not going more than three or four miles per hour and that the collision occurred south of the center of the intersection. If the driver of appellees car approached this intersection at a speed of thirty or thirty-five miles per hour without stopping or slackening her speed upon an icy pavement, the jury, acting as reasonable men, should have returned a verdict of not guilty. The verdict is so manifestly against the weight of the evidence that it cannot be permitted to stand. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full

It was then standing still; that she then looked to the right
and then again looked to the street car and it was right
on her. She says she was looking at it on her side and that
before and at the time of the collision.

The great weight of the evidence is to the effect that
the driver of appellant car approached the intersection at a speed of
thirty or thirty-five miles per hour without stopping or slackening
her speed. The evidence shows that the street car was not going more
than three or four miles per hour and that the collision occurred
within the center of the intersection. If the driver of appellant
car approached this intersection at a speed of thirty or thirty-five
miles per hour without stopping or slackening her speed upon any
pavement, the jury, acting as reasonable men, should have returned
a verdict of not guilty. The verdict is so manifestly against
the light of the evidence that it cannot be permitted to stand.
The evidence is reversed and the cause remanded.

REVEREND AND HONORABLE
Wm. H. Smith
Attorney General

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

FILED
JAN 19 1931

RECORDED
JAN 19 1931
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

2
OCTOBER TERM, A. D. 1930.

Term No. 36.

AG. No. 28

260 I.A. 637⁴

GEORGE S. REINHARDT, et al,
Appellants,

v.

COMMUNITY HIGH SCHOOL DISTRICT

No. 68, In St. Clair County,
Illinois,

Appellee.

:
:
:
:
:
:
:
:
:
:
:

APPEAL FROM

ST. CLAIR CIRCUIT

COURT.

BARRY, P. J. - Appellants sought to enjoin the purchase of a site, the building of a school house and the issuance of bonds on the ground that the election purporting to authorize such action was illegal and void. The trial resulted in a decree dismissing the bill for want of equity at appellants costs. The various contentions will be answered in the order presented without stating all of them in advance.

The death of a member of the Board of Education and the failure to fill the vacancy did not invalidate the action of the remaining members. Cahill's Ill. St. ch. 131, par. 1, cl. 9. Appellants failed to prove there was a valid prior election based upon the petition filed. Appellees proved that in one of the voting precincts no notice of the prior election was given. The alleged prior election was therefore void. Roberts v. Eymann, 304 Ill. 413. The power of the Board to call another election based upon the same petition was not exhausted because of the prior illegal election. The situation is somewhat similar to the entry of an invalid judgment by confession which has been set aside. When an invalid judgment has been rendered by confession/^{and} it is set aside, the power of attorney has not been exhausted and another judgment may be entered thereon. Vandersall v. Goldsmith, 231 App. 165; Hoyt v. Morris, 216 Ill. 321.

THE U. S. DEPT. OF AGRICULTURE

RECEIVED
JAN 10 1964

The notice of the last election was in the form prescribed by the statute. Cahill's Ill. St., ch. 122, par. 322. The ballot was also in proper form. While there is some conflict in the evidence as to whether some of the notices were signed by the president and secretary of the Board, the evidence on behalf of appellee clearly shows that they were all signed by those officers before they were posted. It also appears that appellants offered no evidence in that regard as to at least three of the notices in each precinct. Three notices in each precinct are all that the statute requires. The Court did not err in holding that the precincts were accurately described.

Appellants charge that Dudeck's Hall, one of the polling places, was a place where liquor had been sold at sometime prior to the election and that the proprietor had been convicted of selling liquor and that he was still the proprietor at the time of the election. We cannot say, under the evidence, that the Court erred in finding that the averments were not proven. Appellants insist that the form of the ballot was not legal because the question submitted in each instance was to authorize the Board of Education to build a school house and to issue bonds instead of for the proposition itself to build a school house and to issue bonds. They seek to draw a distinction without any real difference. As appellants concede that the Australian Ballot Law does not apply to such an election, there is no merit in their claim that there was not sufficient secrecy of the ballot.

Appellants aver in their bill that the records and resolutions of the Board of Education do not show that notices of the election were posted in the time and manner and at the places required by law. They offer^{ed} the record of the Board showing the adoption of a resolution which recites that notice of the election was duly posted in the manner and form required by law at least ten days' prior to the election in at least three of the most public places in each of the voting precincts; that the affidavits as to when and where such notices were posted are attached to the resolution and made a part thereof and that true and correct copies of the notices are attached to the affidavits and made a part of the resolution.

Appellee offered three affidavits in evidence, without objection, which showed when and where the notices were posted and copies of the same. Appellants made no objection on the ground that the affidavits were not attached to the resolution or that one of the affidavits seems to bear a date subsequent to that of the adoption of the resolution. We have no way of knowing that the affidavits were not attached to the resolution when it was adopted or whether there is a clerical error in the date in the jurat to one of the affidavits. In the state of the record appellants are in no position to complain as to those matters.

Appellants finally contend that the election was invalid because the several propositions to be voted on were printed on the same ballot in violation of Cahill's Ill. St., ch. 46, par. 219. That statute has no application to elections held under the general provisions of the School Law. No reversible error has been pointed out and the decree is affirmed.

AFFIRMED.

not to be reported in full

Handwritten: 100-67894-2000

STATE OF ILLINOIS
APPELLATE COURT

FOURTH DISTRICT

JAN 19 1931

OC. ORDER TERM A.D. 1930

Term No. 22

Agenda No. 15.

KELLY BROTHERS LUMBER COMPANY,

APPELLEE,

*VS

CHRISTIANA OEHLE,

APPELLANT.

ALEXANDER

CIRCUIT COURT

ALEXANDER COUNTY.

FULTON, WILLIAM J.

260 I.A. 637

This case is here upon an appeal from a decree of the Circuit Court of Alexander County. The Appellee filed its bill in that court to foreclose a mechanic's lien against real estate owned by the Appellant.. Demurrer was sustained to the original bill and the case was tried on an Amended Bill of Complaint and alleges a contract by Appellee with Appellant to furnish materials etc., for repairing the building in question.

Defendant filed an answer denying all material allegations of the bill and sets up a contract for the materials with one Arthur Barter and claims that the same were furnished by Appellee to Barter as a contractor, and not to the Defendant.

The controversy is controlled by the question of whether or not Appellee was a subcontractor or whether Appellee had a contract direct with Appellant for the materials. The case was referred to a Master in Chancery to take proofs and report to the Court his findings of fact and conclusions of law. The Master found both facts and law in favor of Appellee, and also found that there was due to Appellee from Appellant the sum of \$485.05 and interest to date, and that Appellee was entitled to a mechanic's lien for that amount.



Objections to the Master's report were argued, overruled and made exceptions on the hearing in the Circuit Court. The exceptions were overruled and a decree entered in favor of the Appellee as recommended by the Master in Chancery, except as to one small interest item. The appellant's husband made the contract for repairs in behalf of his wife, with one Arthur Barter and testified that Barter agreed to do the work and furnish the materials for the flat sum of \$1500.00. Barter testifies that he agreed to furnish the labor for that amount, but that he was instructed by Oehler to purchase the materials for Mrs. Oehler and that she would pay for them.

The evidence discloses that checks were paid Barter weekly to take care of his payroll; that \$600.00 was paid out for labor to others besides Barter; that Mrs. Oehler paid Appellee the sum of \$300.00 at one time and promised to pay the balance of its account a little later. The Master found the facts in accordance with the contention of the Appellee.

"The report of the Master is not conclusive upon any fact unless it meets with the approval of the Court of Review, before whom the record may be, yet such findings of fact will not be disturbed by a Court of Review unless such Court, upon due examination of all such evidence is able to say that the findings of the Master and the decree of the Court founded thereon, are not supported by the greater weight of the evidence, or are contrary to its probative force."

Gottschalk Const. Co., vs Carlson
253 Ill. App. 520.

In this case we approve of the findings of the Master and the decree of the Circuit Court and the decree entered by that Court will be approved.

AFFIRMED

Not to be reported in full

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A.D. 1930.

Term No. 38

Agenda No. 30.

W. S. LAWRENCE,

APPELLEE

-vs-

JAMES M. TULLY,

APPELLANT.

260 I.A. 638'

APPEAL FROM THE

CIRCUIT COURT OF

WAYNE COUNTY.

FULTON; WILLIAM J.,

The facts are not in dispute in this case and disclose the following situation: On April 3, 1909, one Joseph B. Holloway and wife, being the owners of certain lands in Wayne County, borrowed \$1200.00 from the Aetna Life Insurance Company, and secured the payment of the note representing said loan by mortgage on said lands to the Company; the mortgage was recorded on April 14, 1909. On September 27, 1910, Holloway and wife deeded the lands in question to James M. Tully, the Appellant, and Charles E. Modlin. On February 27, 1912 Modlin and wife conveyed their interest in the lands to the said James M. Tully. On April 9, 1912, James M. Tully deeded the premises in question to Elmer Kurtz, one of the defendants to the original Bill of Complaint, and in each and every one of these conveyances the grantee assumed the payment of the \$1200.00 mortgage owned by the Aetna Life Insurance Company. At the time of the transfer from James M. Tully to Elmer Kurtz, the grantee, as a further consideration for said conveyance, and as part payment of the same, gave to Tully his note for \$400.00 and secured the same by a mortgage on said lands, dated April 12, 1912, which mortgage was duly recorded on November 30, 1912, and which mortgage contained the following clause: "This is given subject to a mortgage of \$1200.00."

On or about December 22, 1923 the Aetna Life Insurance Company demanded payment from Elmer Kurtz of the amount of their mortgage. Kurtz solicited Appellee, W.S. Lawrence, to furnish him the money to pay off this indebtedness. Lawrence had formerly been the agent for the insurance company in making loans in Wayne County. Lawrence raised the money, took a new note and mortgage from Kurtz for \$1200.00 and then went to the Bank and procured a draft with his own funds and remitted it to the Aetna Life Insurance Company in payment of the Holloway mortgage. The making of the new note and mortgage and the remittance to the Insurance Company was all taken care of in one transaction. The new mortgage was dated December 22, 1923 and recorded on the same day. The note given to secure the Holloway mortgage bore interest at the rate of five and one-half per cent per annum, and the note given to Lawrence under the new loan bore interest at seven per cent per annum. The Holloway mortgage provided for five percent for attorneys' fees in case of foreclosure and the new mortgage provided for a \$75.00 attorney fee to be taxed as costs in case of foreclosure. Lawrence was ignorant of the existence of the Tully lien at the time the new mortgage was given.

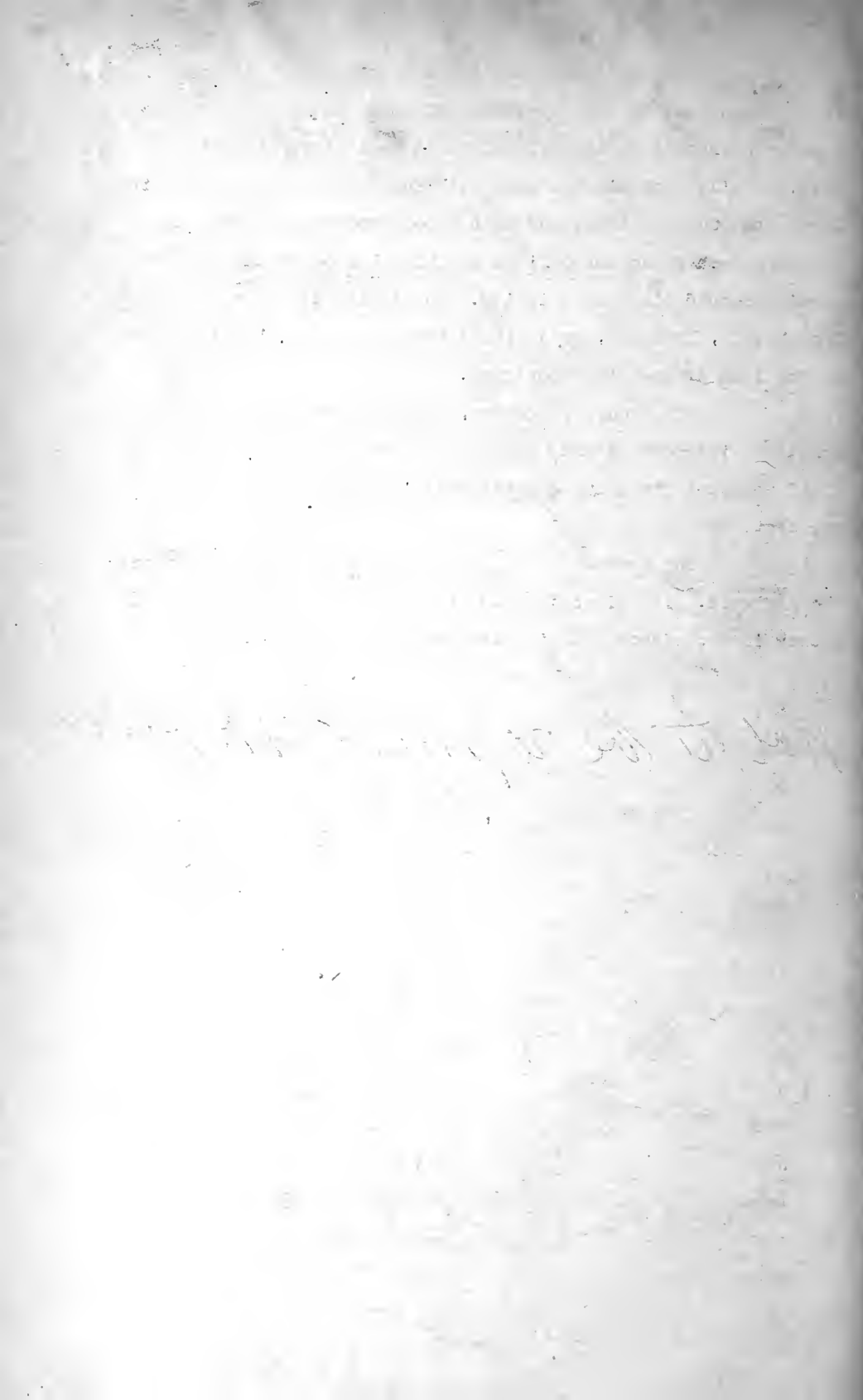
On the failure of Kurtz to pay the Lawrence mortgage or the interest payments thereon, a bill was filed to foreclose alleging it to be a prior lien to that of the Tully lien. Tully filed an answer admitting all the allegations of the bill except that Lawrence paid the Aetna Insurance Company mortgage, or that the mortgage lien of Lawrence was prior to that of Tully. He also filed a cross-bill asking for foreclosure of his mortgage and that it be declared to be a prior and superior lien to the mortgage of Lawrence. The decree of the Court granted foreclosure of both mortgages and directed sale of the lands to satisfy same, directing that Lawrence's mortgage should be first paid from proceeds and balance, if any, to be applied upon Tully encumbrance. Exception was duly taken by Appellant Tully and he has prosecuted the appeal to this Court, asking the reversal of said decree.

The facts and the law applicable to this case are so nearly identical to the situation set forth in the case of Home Savings Bank vs Bierstadt in 168 Ill. 618 that we believe it to be controlling here. Tully took his mortgage with knowledge of the Aetna Life Insurance Company lien, and as a second mortgage subordinate to that encumbrance. We do not believe anything has occurred since which in equity should displace priority. The taking of the new mortgage on December 22, 1923 was, as designed by the parties, but in continuation of the lien of the first mortgage.

The decree, however, should be modified to provide for a rate of interest on the Lawrence loan of not exceeding five and one-half per cent per annum and attorneys' fees of not exceeding five per cent.

The decree of the Circuit Court of Wayne County will be affirmed, with directions to fix the amount due Appellee in decree in accordance with the findings of this Court.

Not to be reported in full ^{AFFIRMED.}



No. 11.

No. 11.

In the
APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

October Term, A. D., 1930.

JAN 10 1931

Robert B. Nov
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

CITY OF EAST ST. LOUIS,)
Appellee,)
vs.)
EAST ST. LOUIS RAILWAY CO.,)
Appellant.)

260 I.A. 638²

OPINION BY JUSTICE FRED G. WOLFE.

This is an action brought by the City of East St. Louis against the appellant, in the City Court, to recover damages for injury to a fire truck, resulting from a collision of such truck with a street car of appellant. The case comes to this court on appeal.

Missouri avenue in the City of East St. Louis runs east and west and is approximately fifty-two feet between curbs. Collinsville avenue runs north and south intersecting Missouri avenue leading to Broadway and the approach to Eads bridge. Main street is about 300-feet west of Collinsville avenue. It enters Missouri avenue from the south, but does not extend across said street. Main street is a paved street, and 38-feet in width between the curbs. South of Missouri avenue on the west side of Main street is the fire station in which the fire-truck in question was kept at the time of the collision. On Missouri avenue there are 2 lines of street-car tracks of the appellant, the north track being used for the west-bound traffic and the south track being used for the east-bound traffic.

On the morning of February 25th, 1925, an alarm of fire came into the engine-house indicating a fire on Collinsville avenue some distance north of Missouri Avenue. The fire-truck in question responded to this call. The truck, which had a total length of 21-feet, drove out of the engine house and northward to Main street and then turned into Missouri avenue to a point 50 to 65 feet east of Main street and collided with a west-bound street car of the appellant which was on the north track in Missouri avenue.

The declaration of the appellee charges that the plaintiff with all due care and diligence was operating said fire-truck along said Main street, but in making the turn from Main street into Missouri avenue that the defendant was carelessly and improperly driving and managing one of its street cars, and that by and through such negligence and improper conduct, the said street car ran into and struck with great force and violence the fire apparatus causing the damage complained of. Trial was had by a jury which resulted in a judgment of \$4552.65 for the plaintiff.

The burden of proving that the plaintiff was not negligent in the operation of the fire-truck, and proving that the defendant, through its servant, was guilty of negligence in the management and control of the street-car was upon the plaintiff; and, if these propositions have not been proven by the preponderance of the evidence, the plaintiff should not recover.

Missouri avenue is practically 52-feet wide and is paved its full width from curb to curb, and the street-car tracks of the appellant are in the center of the street. Nowhere in the evidence of the plaintiff does it show why the driver of the fire-truck did not turn his automobile far enough to the right so as to avoid the collision. The evidence shows that there was no other vehicle on the street at or near the place of the accident to prevent the appellee from using all

of the east bound tracks and the remainder of the south side of the street to drive the fire-truck. The driver of the truck on being asked why he did not stop, replied that it was the duty of the driver of the street-car to stop his car. At another place in his evidence his answer is: "I did not stop because I thought it was the street-car's duty to stop; yes, yes,-- that is the reason; that is right."

Although the Statutes give police vehicles, fire-departments, etc., the right-of-way- over other vehicles, it does not give them the right-of-way over street-cars running on stationary tracks, but such vehicles are subject to the laws of the State of Illinois, and ordinances which limit the speed of other vehicles. In the case of the Illinois Central Railway Co., vs. Scheevers, 134 App. page 517, the Appellate Court of the Third District used this language: "We recognize that it is essential that firemen should be allowed to reach the scene of a fire within the shortest possible time consistent with the safety of the public. It is equally true, however, that no one, not even members of the fire department should be permitted to drive over and along the public street at a rate of speed which might endanger the life and limb of the public." The court in that case held that the rate of speed prescribed by the City Ordinance was binding upon members of the fire department. We are of the opinion that the plaintiff failed to prove that they were in the exercise of due care and caution for the safety of their fire apparatus at the time of the collision.

The evidence shows that the street-car of appellant was traveling westward on the north-bound tracks of the company. The evidence is conflicting as to the rate of speed the street-car was traveling; there is also a conflict in the testimony whether the street-car slackened its speed, or came to a full stop prior to the time of the accident. We think the evidence fails to establish wherein the motorman of the street-

car was negligent in his operation of the car, or that his negligence contributed in any way to the accident in question.

This court is reluctant to set aside a verdict as being against the weight of the evidence, as negligence and contributory negligence are usually questions of fact for the jury to determine and their verdict should usually be decisive of these questions. But, in this case this court is constrained to hold that the appellee was failed to prove the due care required of the driver of the fire-truck and that the negligent operation of the street car was the proximate cause of the accident.^s

For the reasons above stated the judgment of the City Court of East St. Louis is hereby reversed and the case remanded.

not to be reported in full

1000 to be reported on April 1st

IN THE
APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

October Term, A. D., 1930.

FILED

JAN 19 1931

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

W. B. KIRKHAM, Appellee,
vs. Appellee,
OLIVE BRANCH MINERAL
PRODUCTS COMPANY,
Appellant.

260 I.A. 638³

Appeal from the
Circuit Court of
Alexander County.

Opinion by Justice Fred Wolfe.

The appellee started suit in the Circuit Court of Alexander County against the defendant on two separate suits, one of which was filed November 25th, 1929, and the other was filed January 31, 1930, both brought to the February term of said Court. In the first suit the appellant filed the general issue and a plea of payment; in the second suit the appellant filed a plea of general issue. By agreement of the parties the two suits were consolidated and tried before the Honorable A. E. Summers, presiding judge of said court. The trial court found all the issues in favor of the appellee and assessed his damages at \$1100.00.

The appellee at the time of filing each suit filed a copy of the account sued on. The first suit was for the balance due on wages that he claimed were actually performed for the appellant in the sum of \$650.00, and for money advanced and paid out by the appellee for the appellant, \$50.00; the account showing that he had earned \$1700.00, and credited by

payments of \$1050.00. The second count was for salary and wages from October 10 to January 5, 1930, at \$150.00 a month, or a total of \$500.00.

From a review of the evidence there seems to be no question that the plaintiff had earned \$1700.00 for salary and wages and had only been paid \$1050.00, leaving a balance due on the wages of \$650.00, as claimed by the appellee in the first suit filed. There seems to be no dispute as to the balance of \$50.00, as claimed by the appellee that was due for money advanced to the appellant. It is agreed by both parties that the appellee sold two tanks and received therefor the sum of \$500.00. It is the contention of the appellant that this amount should be deducted from the \$700.00 due the appellant, and leave only a balance of \$200.00, instead of \$700.00, as claimed by the appellee.

The records show that the appellee advanced for the appellant the sum of \$1750; that \$1200.00 of this money was repaid to the appellee, leaving a balance of \$550.00 due the appellee for money advanced; that the appellee applied the \$500.00 he received from the sale of tanks on the indebtedness due from the appellants to appellee for the money advanced, leaving a balance due in the sum of \$50.00.

We are of the opinion that the trial court properly found that the appellants owed the appellee the sum of \$700.00 under the first suit filed.

In the second suit appellee claims that he was employed for one year, and that on October 10th he was unlawfully discharged by the appellants, and, therefore, was unable to fulfill his part of the contract, but was at all times ready and willing to do so. He does not claim that he actually rendered the services, but the suit is for money that he would have earned had he been permitted to carry out his part of the contract.

In this suit the plaintiff filed his declaration as a

...for the purpose of the ...

...to January 2, 1880, at ...

...of ...

...of the ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

...of ...

single count for \$500.00 for his salary and wages due him for labor and services performed by him for the defendant. It is the contention of the appellant that he could not recover under the declaration, but he should have declared specially for a breach of the contract for unlawful dismissal from service.

The record shows that the defendant company duly excepted to the rendition of the judgment at the time of the trial and has raised this point in its assignment of errors in this court. The appellees contend that the point was not urged before the trial court, and therefore, it cannot be urged for the first time in this court, and cite numerous cases in which our Supreme Court and Appellate Courts have held that in a case tried by a jury the question of variance for the first time cannot be raised in the Appellate Court, but should be called to the attention of the trial court, so that the injury, if any, could be remedied in the trial court.

The cases cited by the appellee, no doubt, sustain that contention, but when the jury is waived and a question of fact is tried before the trial judge, and exception duly entered to the judgment, the case is then properly preserved for review in the Appellate Court. (The Climax Tag Company vs. The American Tag Company, 234 Ill., 179.) (Sec. 82 of Practice Act; Sands vs. Kagey, 150 Ill., 115; Sands vs. Waraser, 149 Ill., 530.)

The declaration charges that the defendant "was indebted to the plaintiff in the sum of \$500.00 as salary and wages due the plaintiff for labor and services of the plaintiff by him, before that time done and bestowed in and about the business of the defendant at the defendant's request, etc."

The caption of the account sued upon was as follows: "Salary and Wages, 1929." "October 10 to November 1. \$100.00; November \$150.00; December \$150.00; to January 25th, 1930, \$100.00. Total \$500.00."

Our courts in a long line of cases have held that a person cannot recover for damages for a breach of contract to pay wages under the common counts, or on a suit for work and labor performed, as appellee has attempted to do in this case. It is not contended that the appellee performed the service or rendered any service whatsoever under the second suit in this case, but, if he can recover at all it is upon the theory of constructive service, which our courts do not recognize. (Bean vs. Eldon, 44 App. 443; Thompson vs. Hobert, 12 App. 588; Dougherty vs. Shipper, et al., 157 App. 415; Hardy vs. Dobler, 248 App., 361; Trustees of Soldiers' Home vs. Shaffer, 636 Ill., 243; Dougherty vs. Shipper, above cited is affirmed in the 250 Ill., p. 128.)

We are of the opinion that the evidence shows that the appellant was justified in discharging the appellee; and if so, the appellee would not be entitled to recover in the second suit. The evidence shows that a part of the appellee's duties was to manage the office and take charge of the books of the company. Mr. Devers, the auditor, testified, "that the books were in such a condition at the time of making the second audit that it was impossible to make a detailed audit." Mr. Hines, the director and general manager of the company testified, "that the appellee was about the place only about one-half the time; that he was present when the president of the company discharged the appellee." He further testified, "that the books were in such a condition that we never could get any figures from them when we needed them; it was impossible half the time to tell what cash we had on hand. That, in his opinion, Mr. Kirkham was not properly attending to his business, and he reported the same to Mr. Bartlett, the president of the company." Mr. Reichert, a director and foreman of the company in charge of the production, testified to substantially the same facts as did Mr. Hines.

Taking all these facts into consideration, we are of the

opinion that the appellants were justified, and properly discharged the appellee from their service, and he is not entitled to anything under the second suit in this case. It is, therefore, ordered that if the appellee will file a remittitur of \$400.00 in this Court within twenty days from the date of filing this opinion, the judgment of the Circuit Court of Alexander County will be affirmed, If the remittitur is not filed within twenty days, then the case will be reversed and remanded to the Circuit Court of Alexander County.

Not to be reported in full.

IN THE
APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT.

October Term, A. D., 1930.

FILED

JAN 10 1931

Robert B. Rook
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

LEO F. WAGNER,
Appellee,

vs.

LOUIS W. BUECHER,
Appellant.

260 I.A. 638⁴

Appeal from the
Circuit Court of
St. Clair County,

Opinion by Justice Fred G. Wolfe.

Appellee, Leo F. Wagner, filed his suit against Louis W. Buecher, appellant, in the Circuit Court of St. Clair County to the April term, 1929. In his declaration he charges that on the 25th day of February, 1929, he was possessed of an automobile, and driving it in an easterly direction on State Bond Road No. 158, near Belleville, Illinois, with due and ordinary care for the safety of himself and the automobile; that the appellant through his agent, namely, his son, was possessed of and operating his automobile in a westerly direction on said road, and as the two automobiles were about to meet and pass, the appellant, through his agent, carelessly and negligently operated his automobile so as to cause the same to run upon and against the automobile possessed by the appellee; that by reason of such collision the automobile of the plaintiff was mashed and bent; and that the appellee was thrown with great force and violence out of the automobile, and by reason thereof sustained severe injuries. The declaration described the injuries claimed, both to the plaintiff and to the automobile. The declaration

17

APPROVAL OF THE BOARD

18

19

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145
2146
2147
2148
2149
2150
2151
2152
2153
2154
2155
2156
2157
2158
2159
2160
2161
2162
2163
2164
2165
2166
2167
2168
2169
2170
2171
2172
2173
2174
2175
2176
2177
2178
2179
2180
2181
2182
2183
2184
2185
2186
2187
2188
2189
2190
2191
2192
2193
2194
2195
2196
2197
2198
2199
2200
2201
2202
2203
2204
2205
2206
2207
2208
2209
2210
2211
2212
2213
2214
2215
2216
2217
2218
2219
2220
2221
2222
2223
2224
2225
2226
2227
2228
2229
2230
2231
223

charges that the appellee was the owner of the automobile that he was driving.

The appellant filed a plea of not guilty. The case was tried in the September Term 1929 of court and resulted in favor of the appellee for the sum of \$1500.00. A new trial was granted and the case again tried at the April Term of 1930 of said Court and resulted in a judgment in favor of the appellee and against the appellant in the sum of \$5000.00. The motion for a new trial, etc., was overruled, and the case now comes to this court on appeal.

It is the contention of the appellant that the evidence in the case does not support the verdict, and does not prove negligence on the part of the appellant, and shows that the appellee was guilty of contributory negligence which caused the injury. The question as to what is the proximate cause of the injury, as to contributory negligence, as to the credibility of the witnesses, the weight of the testimony, and the inferences to be drawn from the facts proved, are ordinarily all questions for the jury to pass upon and not for the court to decide. (Molloy vs. Chicago Rapid Transit Company, 335 Ill., 164; Greenwall vs. B. & N. Railroad Co., 332 Ill., 627.) From an examination of the record in this case we are of the opinion the jury was justified in finding the issues as they did. We cannot say that their finding is manifestly against the weight of the evidence.

The declaration charges that the automobile in question was the property of the appellee, Leo F. Wagner. The evidence shows that the automobile belonged to appellee's father, H. A. Wagner. At the time the evidence was given relative to the value of the automobile and the damage to the same, appellants objected to the same on the ground that the evidence showed that it belonged to the father instead of to the appellee. We are of the opinion it was

error for the court not to sustain the objection and the appellee should not, in this suit, recover for damage to the car that belonged to his father. (Smith v. Kurrus, 31 App. 276.)

Complaint is made to the plaintiff's instructions, but we can find no reversible error in the giving of the instructions in this case. H. A. Wagner, in testifying to the damage done to the automobile said that, "before the accident the car was worth \$350.00; and that after the accident it was fit only for junk and worth \$12.00, or a damage to the car of \$338.00. This evidence was not disputed, and, no doubt, the jury took this amount into consideration in arriving at the plaintiff's damages. This amount should be deducted from the amount of the verdict of \$5000.00

It is therefore ordered by this court that, if the appellee, Leo F. Wagner, will, within twenty days from the filing of this opinion, file a remittitur of \$338.00 in this court, then the judgment of the Circuit Court of St. Clair County will be affirmed. If said remittitur is not filed within said time, then the case will be reversed and remanded to said St. Clair Circuit Court, ~~to be tried again.~~

not to be reported in full

error for the court not to sustain the objection, and the appellee should not, in this suit, recover damages for the car that belonged to his father.

CONFIDENTIAL - EYES ONLY

Was the old plantation in

